

Success in Court

By SAMUEL H. WANDELL

Of the New York Bar,

Author of "Law of Inns;" "Law of the Theatre;" "Law of Decedents' Real Estate," etc.



I N the ancient days of England all attorneys were obliged to attend court at stated periods, and a nonattendance for successive terms was sufficient cause for expulsion from the roll. The reason of this rule was the desirability of having attorneys obtain practical experience in the conduct of causes and familiarity with the procedure of the courts. Experience in the trial of cases is the best school of preparation for the lawyer.

It is difficult to precisely define the qualifications of a successful trial lawyer. In one of the old English books of practice, entitled "The Compleat Solicitor," the author stated: "A solicitor ought to have a good *natural wit*, which wit must be refined by *education*, and that education perfected by *learning*; that his learning should be balanced with *discretion*; and to manifest all, it is requisite he should have a *free* and *voluble tongue*. All these are undoubtedly necessary to accomplish the regular solicitor,

to which I shall add he should likewise be well read in our laws, be in his business vigilant and wary, and in application unwearied, for his diligence must recommend him to the world, as well as his abilities."

It is quite possible for any lawyer of average ability to become a fairly successful pleader in the courts by becoming familiar with the leading works on evidence and thoroughly preparing himself in advance of the trial. Careful preparation gives the attorney confidence in himself, which is an important element of success at the bar.

The Honorable Daniel S. Dickinson, in an address delivered in 1858 to the graduating class of the law department of Hamilton College, said: "There is no royal road to position at the bar; no stealthy by-way through which it can be reached; no slippery and filthy step-stone by which bribery can ascend to purchase it; no hot-bed growth which will produce it; no forcing process which will prove successful. No superficial gilding will conceal shameful ignorance; no spread-eagle declamation pass current as a substitute for knowledge; no spouting and

floundering on the surface can deceive a discerning public. But drafts at sight upon the golden granary of learning will always command a premium and be duly honored. No diligent student, of good natural capacity, ever failed of success; no indolent genius, however gifted and brilliant, ever gained eminence at the bar."

It should be remembered that the lawyer in court is himself upon trial, and he should therefore be always well prepared both upon the law and the facts involved in the litigations in which he appears. He should master the technical legal propositions which are likely to come up for discussion, and have an array of authoritative cases noted on his brief for citation to the court at the proper time. He should also have a well-grounded theory of his case, and sufficient evidence to substantiate it.

It has been truly said that a lawyer "must labor when the court indulges in relaxation, and study when his clients slumber." He should never bring a case on for trial unless he is thoroughly prepared. The witnesses to be summoned on the side of his client should be interviewed in advance of the trial, and an abstract made of the principal points of their testimony. The utmost care should be given to the arrangement of the evidence in its logical order, so that when presented it will have its full probative effect. The sequence of the events involved in the *res gestæ* should be noted when preparing the case for trial. Every lawsuit is a drama in which the respective counsel play the leading parts; the lawyer must therefore consider the dramatic unities of time and place, of cause and effect, and so develop the evidence as to create the greatest effect upon the jury.

Courteous Demeanor.

The lawyer's bearing in court often has a great influence in determining the result of the litigations in which he appears. His conduct of the cause will necessarily secure either the commendation or the criticism of judges, juries, fellow members of the bar, and spectators. His attitude toward the court should be always characterized by the utmost respect and deference, even should

the judge be imperious and tyrannical. Proper courtesy should also be shown to the opposing counsel, even if he should himself prove to be lacking in manners; nothing is so well calculated to disarm a vulgar or impertinent opponent as an unruffled and courteous demeanor. Personalities between counsel in court should be avoided as far as possible; a lawyer should always preserve his own self-respect, even under trying circumstances; perfect self-command will give him an incalculable advantage over an impudent and waspish adversary; politeness will often baffle the pettifogger.

Examination of Witnesses.

In the examination of his own witnesses the lawyer should endeavor to bring out the testimony in a perfectly natural manner, and should refrain from unnecessarily interrupting the witness or suggesting answers by the form of his interrogations. The effect of the evidence will be greatly enhanced if the witnesses are permitted to state the facts to which they depose in their own way, without the constant prompting of counsel. The character and demeanor of the various witnesses must be promptly noted by the examiner, and the form of the examination should be accommodated to the manner of the witness. If a witness seems to be frightened and concerned, the lawyer's opening questions should be calculated to aid him in regaining his self-possession. It would be advisable to begin with such a witness by asking him some very simple questions concerning his residence and occupation, his acquaintance with the parties, etc. Then, after he has in a measure recovered from "stage-fright," he may be questioned upon the main points of the case. If a witness is inclined to be "smart," and there is reason to apprehend that he may injure the case by his forwardness, it would be proper to conduct his examination with considerable ceremony, and a certain reserve of manner which would likely have a tendency to impress him with a due sense of the gravity of the occasion. When a witness proves hostile, it is well to get rid of him as quickly as possible. If the court is satisfied that a witness is really adverse

to the cause of the party in whose behalf he has been summoned, it will relax the rule prohibiting leading questions, and will allow the examination in chief to be conducted on the lines of a cross-examination; but the attorney who has called the witness is always under a disadvantage, as by having called him he has impliedly vouched for his credibility. If counsel is surprised by the hostile attitude of a witness, he should boldly expose the hostility so unexpectedly discovered, in order that the motives for testifying are clearly apparent to the court and jury.

Cross-Examination.

The cross-examination of an adverse witness is commonly considered as the surest test of the knowledge and skill of the advocate. It requires a greater intellectual effort to conduct a cross-examination than an examination of one's own witnesses, and taxes the ingenuity and resources of the lawyer.

There are two methods of cross-examination generally used among lawyers, which may be respectively termed the fierce, bulldozing style, and the pleasant, persuasive style. The bulldozer aims to scare the witness, and thus break down the effect of his direct evidence by extorting from him an admission that he has committed perjury, or by compelling him to relate an inconsistent story on the cross-examination. The bulldozer takes for his model the officials of the Spanish Inquisition; the witness chair is converted by him into a rack whereupon the victim of his wrath is stretched and tortured in an endeavor to compel him to beg for mercy. His methods sometimes recall the days of Jeffreys and the Bloody Assizes.

The witness who is subject to such an ordeal becomes at once the enemy of the lawyer who is conducting the cross-examination; he is immediately angry and defiant, takes up the challenge, and matches wits with the advocate. There are unquestionably cases where such a method of examination is proper and necessary, but they form the exception to the rule.

The pleasant style of cross-examina-

tion will usually produce far more beneficial results. By appearing friendly to an opposing witness you at once disarm him of the hostility and prejudice with which he has been regarding you during his direct examination. He has probably been expecting an assault upon his character, and is prepared to defend himself, but under the influence of good-humored questions he becomes softened, and is the more easily led to tell the exact truth. The old adage that "molasses catches more flies than vinegar" applies with peculiar force to the cross-examination of a witness.

A cardinal rule for cross-examination is that no questions should be asked without an object. The witness should not be interrogated aimlessly, and it is far better to ask too few than too many questions. The mistake is often made of bringing out additional evidence in favor of an opponent upon the cross-examination, without impeaching the witness's credibility.

It is necessary for the advocate to promptly determine the kind of cross-examination to be followed. A shifty, lying witness should be openly and fearlessly attacked, while the cross-examination of a conscientious and truthful witness should be entirely different in character. The right of cross-examination should never be abused by the advocate, and he should always remember that a license to practise law does not carry with it the privilege to insult persons of undoubted respectability. An attack upon an opposing witness often proves to be a boomerang. If the character of the adverse witness is vulnerable, it may be advisable to adopt a severe and searching style of cross-examination, but it must be borne in mind that assaults upon a witness's character are always dangerous, and tend to create a certain sympathy in the minds of the occupants of the jury-box.

If a witness called by an opponent has given damaging evidence with apparent sincerity, his cross-examination should be conducted with extreme caution; he should not be given the opportunity to relate his story all over again, and the inquiry should be as brief as possible. The cross-examiner should endeavor to

bring out some other and unimportant matters, thus drawing the attention of the jury away from the zone of danger. It is better to treat the damaging portion of such a witness's testimony as unimportant; the advocate should never appear to be disconcerted by any testimony given during the progress of the trial, no matter how injurious to his client's cause.

The objects of cross-examination are to undermine or weaken the force and effect of the testimony given by the witness upon the direct; also to draw out new matter favorable to the side represented by the cross-examiner; and to impeach or discredit the witness. If the object be to weaken the effect of the direct testimony, the cross-examination should be directed to show either that the witness has sworn falsely, or that the matter is capable of an explanation, or else that he is mistaken in his statements. It is usually easier to obtain an explanation than to force a witness to contradict himself directly. If, however, the object of the cross-examiner is to obtain some information from the witness favorable to the cross-examiner's own side of the controversy, he must take his character and demeanor into consideration. If the witness appears to be candid and truthful he may be openly interrogated; if, upon the other hand it is suspected that he is not reliable, the approach should be made cautiously. The examination should be conducted with great skill; the line of opening questions should be remotely related to the subject, and the witness should not be allowed to perceive the object in view. All suspicions in the mind of the witness should be allayed, so that he may be taken completely off his guard.

The skilful cross-examiner may sometimes beguile a hostile witness into relating a version of the transaction which is wholly inconsistent with that told by him upon his own direct examination, or else is entirely at variance with what has been previously related by another witness called by the adverse party. In either case the purpose of the cross-examination has been accomplished; the witness has either contradicted himself, or else has discredited the evidence of his fel-

low witness. The adversary will be then put in the dilemma of explaining away the contradictions of his own witnesses.

Expert Witnesses.

The cross-examination of expert witnesses affords to the lawyer the greatest opportunity for distinguishing himself at the bar. If the cross-examiner has carefully prepared himself in advance of the trial, he can often, by skilfully worded questions, entangle an expert witness, and force him to make admissions which seriously impair the value of the testimony given on his direct examination. An example of a skilful cross-examination is found in the report of the trial of William Palmer at the Old Bailey for the poisoning of one Cook by strychnine. The defense sought to show that the cause of death was tetanus, and called a celebrated medical man of Leeds, who said the symptoms were tetanic; that Cook was a man of delicate constitution, had a sore resulting from disease, was excitable in disposition, and that on a man of such constitution and temperament, having the sore, a slight cold would have the effect of causing idiopathic tetanus.

On cross-examination by Cockburn the doctor was forced to admit that he did not really know that the deceased was delicate, and had not learned that the organs were found in a healthy condition after death. He was made to confess that he did not know the deceased had ever had any such disease or sore as referred to in his direct testimony; he also admitted there was no ground for supposing that Cook had a cold. Cockburn then incisively inquired: "Now, sir, with the delicate constitution gone, the disease gone, the sore gone, the cold gone, what grounds have you for saying that there was idiopathic tetanus?" The unhappy physician squirmed, hedged, and took refuge in several general assertions, which were, however, completely demolished by his relentless inquisitor, while the effect of his testimony was entirely overthrown by the superior knowledge of poisons displayed by the lawyer who conducted his cross-examination.

I recall a cross-examination of a med-

ical witness which I heard conducted many years ago by Gerritt A. Forbes, of Morrisville, New York, who afterwards became a Justice of the supreme court. He was defending a woman charged with having murdered her mother by poisoning. The defense was that deceased died from natural causes, and it was sought to show that the post mortem examination had revealed a condition of the vital organs which made it impossible for any physician to determine with certainty the exact cause of death. The doctor who had conducted the post mortem testified that in his opinion death was caused by arsenical poison. Judge Forbes drew out from him on cross-examination the general condition of the deceased as disclosed by the autopsy, and then asked: "If a man went under a tree during a thunderstorm, and that tree was struck by lightning, and if his dead body was afterwards found with marks of the electric fluid upon it, and also with a bullet through his brain, and a dagger through his heart, and if an autopsy showed the presence of poison, what, in your opinion, would be the cause of death?" This line of defense proved successful, for notwithstanding the strong case presented by the prosecution, showing both opportunity and motive, the jury rendered a verdict of acquittal.

An amusing instance of the confusion of a medical witness occurred in an interior county of New York a few years ago, during an inquiry regarding the sanity of a prisoner charged with murder. A certain pompous appearing physician was called by the defense, and testified that the defendant at the time of committing the murder in question was undoubtedly insane. His confident manner and bearing made an evident impression upon the jury. The wily district attorney suspected that the medical man was a humbug, and adroitly laid a trap which proved his undoing. He began by asking the doctor as to his experience in lunacy matters, his education, researches, etc. The witness was profuse in his replies, evidently endeavoring to create the impression that he knew everything that was to be learned on the subject. The district attorney then asked his opinion

as to the value of certain well-known authorities on medical jurisprudence. The witness declared that he had consumed considerable midnight oil in reading every one of the works mentioned by his questioner. The district attorney then sprang the trap which had been so well laid, and asked the physician if he had read several purely imaginary works, the titles of which the astute lawyer invented for the occasion. To the astonishment of court and counsel the doctor promptly declared he had read them all. The examination was something as follows:

Q. Doctor, have you ever read Wagner and Mozart's treatise on Medical Jurisprudence?

A. Yes, I recall reading it some years ago.

Q. Do you consider it a standard of authority on the subject?

A. I should say that it is.

Q. Have you also read Hobbey on Hallucinations?

A. Yes, I'm quite sure I recall reading that work.

Q. Are you familiar with the works of Hoyle, Pole, and Cavendish on Mental Diseases?

A. Yes, sir.

Q. You have studied their works?

A. Yes, sir.

Q. Do you agree with the statements which are made by these authors?

A. To some extent I do.

Q. Have you studied May on Mania, Daniel on Dementia, Paley on Paralysis and Story on Treatment of the Insane?

A. I have.

Q. You have read all these works?

A. Yes, sir.

Q. You have carefully studied them?

A. Yes, sir.

District Attorney: That is all, Doctor.

During this cross-examination jurors, lawyers, and spectators had become convulsed with merriment, and the explosion of laughter which greeted the unhappy "expert's" dismissal from the stand was not rebuked by the usually austere judge.

Summing Up.

In summing up a case the lawyer should endeavor to convince the jurors by logical argument, of the justice of his cause. He should confine his address to the evidence in the case, should point out any discrepancies in the testimony of the witnesses on the opposing side, and bring out clearly the points which have been established in favor of his client. Lawyers often soar away over the heads of a jury, are too diffuse, and wander far afield from the real issues involved in the case. There was a strong contrast between Alexander Hamilton and Aaron Burr in this respect. Hamilton had a lofty style, and his arguments were often of great length, but while he was conceded to be both eloquent and profound, Burr was by far the shrewder lawyer in the management of cases before a jury. The latter as noted as a consummate winner of verdicts and had the rare art of marshaling his facts in a convincing manner. He was not given to long-winded speeches, but was pithy and concise. It is stated that he would follow one of Hamilton's long and masterly flights of eloquence with a few well-chosen remarks, so sharp and so directly to the point that judge and jury would be immediately won over, and the great plea of Hamilton would fall, a disjointed mass of words. No wonder Hamilton hated Burr; the latter was usually successful when they were opposed at the bar, and also stood in the way of his own cherished political ambitions.

Prejudice Against Lawyers.

It is probable that no other class of business or professional men receive so little consideration at the hands of juries as lawyers. Whenever a lawyer brings a suit for a fee he encounters a certain prejudice among jurors, who instinctively sympathize with the defendant in the case. It makes no difference how faithfully the lawyer has served his client's interests, how much time he has devoted to his affairs, how successful he may have been in his management and conduct of the matters intrusted to his professional care, nor how inadequately he has been compensated for his services.

He has an up-hill fight from the outset to convince any jury that he is in the right. If the defendant is represented by a glib-tongued, unscrupulous attorney who has little regard for legal ethics or the amenities of the profession, he can usually succeed in either entirely defeating the lawyer's claim, or in reducing his demands far below what the services are fairly and reasonably worth.

An amusing incident illustrating this general prejudice of juries toward lawyers occurred some years ago in Syracuse, New York, where I was formerly in practice. An old lawyer who was often made the butt of rather cruel jokes by the younger members of the profession brought suit in a justice's court to recover a fee from one of his clients, who did not appear to defend the action, being generally considered "judgment proof." When the case was called on the return day, the late Isaac D. Garfield, a noted wag, and also one of the most brilliant lawyers of central New York, who happened to be in court, answered "ready" for the defendant, demanded that the plaintiff furnish a bill of particulars, and also that the defendant have a jury trial. Garfield paid the jury fee out of his own pocket, and, after the jurors had been selected, devoted all his splendid legal tact and skill in behalf of the defendant, who did not even know he was being defended. The bill of particulars furnished by the plaintiff showed that a small fee had been paid as a retainer by the client. This was the basis of Garfield's defense. The unhappy plaintiff was cross-examined at great length as to the amount of time spent by him in attending to defendant's business matters; lawyers were called in behalf of the defense, who answered in response to a hypothetical question that in their opinion the cash retainer already paid was a sufficient compensation for the work performed. Garfield harangued the jury in a most eloquent manner, depicting the plaintiff as trying to collect an extortionate sum for his services, and praying them to protect his poor client from the rapacity of the rascals of the bar. The jury had no idea that this was all a farce on the part of Garfield and some other lawyers who had

joined with him in the joke, and, without leaving their seats, voted for a verdict in favor of the defendant. I relate this little anecdote merely to illustrate the universal prejudice of jurors against suits brought by lawyers to recover fees. A smart pettifogger can usually defeat the just claim of any honest and reputable attorney before the ordinary jury.

Defeats.

The lawyer should be cautious about instituting litigations in which the chances of success are largely in favor of the party sued. Defeats in court are bad advertisements for the attorney, and while the results of litigation are always uncertain, the careful practitioner should refrain from bringing on a case for trial in which there is little or no prospect of winning a verdict.

Defense of Guilty Person.

In considering the ethics of advocacy, the question is often asked whether a lawyer should defend a prisoner when he knows him to be guilty of the crime charged against him. The general opinion of the laity is that he is not justified in undertaking or continuing a defense under such circumstances, but a different standard has been prescribed for guidance of the legal conscience by eminent judges. In the case of the assassin of President McKinlev, two former justices of the supreme court were assigned by the presiding judge to represent the defendant at the trial.

A remarkable instance which is illustrative of this doubtful point occurred in England at the trial of Courvosier for the murder of Lord William Russell, in 1840. The prisoner was represented by Phillips, one of the most celebrated advocates of the period. At the end of the first day of the trial it seemed almost certain that the defendant would be acquitted, as the witnesses for the Crown had been so shaken upon cross-examination that no one believed their testimony. Both Phillips and his junior, Clarkson,

were firmly convinced at the outset of their client's innocence. Before the trial opened on the second day, however, the prisoner confessed to his lawyers that he had committed the murder, but stated he expected them to still defend him. Phillips was for throwing up the brief, but was opposed by Clarkson, who pointed out that the prisoner was on trial for his life, and entitled to a defense. In this dilemma they consulted privately with Baron Parke, who was sitting on the bench with Chief Justice Tindal at the trial in the Old Bailey. Baron Parke made this decision: "If the prisoner still requests you to defend him, you are bound to do so, and to use every fair argument from the evidence." Phillips thereupon continued the defense of the prisoner, who was, however, convicted and suffered the death penalty.

The question is at best a delicate one, and involves the honor of the bar in its consideration. Perhaps, after all, it is more abstract than real, for it is seldom that a prisoner owns up to his counsel that he is guilty.

Art of Winning.

No set rules can be prescribed for attaining success at the bar, nor can the art of winning causes be learned by rote. A few "danger signals" may, however, be considered. The lawyer who wishes to succeed in his client's cause should always be thoroughly prepared; he should be ever on the alert for ambushes, masked batteries, and rear attacks; he should never be overconfident. He should preserve his self-control, and wear it like a coat of mail. He should never attempt to mislead the judge who presides at the trial; he should never stifle his conscience in his zeal for his client, nor seek to secure a verdict by corrupt or dishonest means. If he cannot win honorably, he had better suffer defeat.

Samuel H. Wandes



The Public Defender

BY ROBERT FERRARI,

Member of the New York City Bar—Associate Editor of the Journal of Criminal Law and Criminology.



THE idea of a Public Defender has within the last two or three years made its way into the minds of thinking men with rapidity and assurance. The question of protection for the helpless in courts of justice was not even agitated a few years ago. A silence as of the tomb brooded over the face of the waters. It was calm. Everyone was satisfied. At least anyone who saw the urgent need for a public advocate had no inclination or power or authority to make himself heard. Whatever was, was right. To the few to whom the idea had occurred, and who had the public spirit to bruit it abroad, only scoffs and scorn were directed. "You are a Utopian. The idea is a very good one. We ought to have a public defender; but—but." As Wendell Phillips said in his great speech for woman suffrage, prejudices were never reasoned up, and so they cannot be reasoned down. The prejudice of the sanctity of the established order is the most overwhelming, the most deadening prejudice that has to be combated. Innovation of any kind is frowned on. No one must attempt anything that runs counter to what is, lest he be looked upon as a crank, or a down-right crazy man. Even in this country—the country pre-eminently of advance, of progress, of novelty, the prejudice of the new is, in many fields of activity, overpowering. In the field of applied science we have made rapid strides. No one has hesitated to use Welsbach lights because they were something new. Nobody has been foolish enough not to want to use elevators in sky scrapers because they were something against use and wont. But people have objected to

the employment of the steam shovel, the drill, the factory machinery which makes hand labor practically a negative matter. And experiments in government, especially, have been the subjects of hot attack. It will ever be so as long as government is in the hands of persons to whom the people, in their sovereignty, transfer it.

A Martian Visitor.

If a man should come from Mars, and become a spectator of the systems of government and of life on our planet, there could be no doubt that fruitful suggestions as to beneficial changes would be immediately forthcoming. And if that visitor from Mars had power, there is no doubt that those changes would be put into immediate effect. So, if that same visitor were to come to our land, and should behold our system of administering justice, civil and criminal, he would be astonished at the asymmetry. "Why," he would say, "does this abnormality exist? I see the state prosecuting actual or supposed offenders, guilty and innocent persons alike; but I behold the state taking no interest in helping and defending its citizens. It is true prisoners are represented, but why should not their prosecutors too be represented by private counsel? Oh, yes! I understand. The state is prosecuting because it considers itself injured by the act of the prisoner. But, pray, how has the state convinced itself that the act of the prisoner is against its rules? The case has not yet been tried. It may be, as it sometimes happens, that the verdict will be acquittal. What then? Will the state regret its action? Will it punish him who prosecuted? No? Well, why not? It is curious to me. Does the state take no fatherly interest in the one who is falsely accused? It seems to me that he needs aid and succor as much as, if not more

than, he who accuses with color of right. And how about him who accuses falsely? Should he be treated by the state infinitely better than he who suffers imprisonment and shame and pain because of the unjust action of his prosecutor?

"I see about me vast hordes of poor men out of employment. I see heavy-laden souls, long striving, eternally battling, in whom there is no peace and no strength. I see them yearning till the heart becomes sick, hungering for work, for opportunity to live, for work with the hands and for work with the brains. I look upon them, and see in them their histories—histories which have made them what they are through no fault of their own. Accidents of birth, accidents of environment, accidents of opportunity—have for the most part brought them to this dolorous pass. They have manfully striven, and they have failed. They need help and comfort. They are fleeced by their stronger, more fortunate "brothers."

These brothers are wolves, but they are dressed in the clothing of the sheep about them. Only externally are they alike. The weaker are stamped upon, crushed, murdered. The swift flying machine cuts off the limb of this breadwinner of a family of six. The locomotive engine snuffs out the life of this other mainstay of a mother and a sister. The heartless boss tailor refuses to pay his just debt to the workingman who has labored for him for weeks. The orphan is kept out of his inheritance. The infant is imposed upon. Where is the guardian of all these? Where the friend, the consoler, the helper, the defender? What is this "system"

of yours? It is rather an incomplete machine—no order in it, no fullness no soul."

Our Martian visitor would be right. Coming to us fresh, without any preconceived notions, without biases of any sort, without the accretions of time and circumstance, he would see straight through the deeds and the products of men. But he would not stop at the theoretic advocacy of obvious principles. He would set about to put those principles

into action. He would go to the men in power, and tell them: "I am interested in you. I come from another planet, but I have a fellow feeling for you. I have noticed much since I have come among you, and I have been especially struck by your peculiar system of administering justice. To me it seems unjust in the extreme. How it came to be what it is, I have an inkling of. How it can be allowed to remain as it is, I cannot see. Your first thought must be to give the helpless a defender."

Of course, the men in power would not see it as the

Martian did. They could not feel the utter strangeness, and the disharmony of it all. They could not see the crushing injustice of it. But the Martian would not rest. He would insist upon his idea. He would continue to direct his blows upon the "system," and to open minds to the light. Gradually they would come to see the rosy dawn, and soon the sun in glorious splendor would be standing tiptoe on the misty mountain tops.

Change in Public Sentiment.

Within the last two years the greatest



ROBERT FERRARI

minds have come to advocate the office of public defender. Many more who do not actively advocate it believe in it. A change can be seen on the platform and in the press. The heckling of a conservative speaker on government, in New York city, brought about the rapid conversion of a distinguished professor of law to more modern views. The constant battering in the papers, and in the popular and technical magazines, has brought about a condition of softness in the objects. One of the twelve greatest legal minds in the country asked the vital question, in an editorial in a recent number of the *Journal of Criminal Law and Criminology*, whether the institution of a public defender would obviate the unconscionable, immoral, and illegal practices of private attorneys in their overzeal for their clients, and lift the tone of that part of the profession that practices criminal law. And the same question might be asked about that part of the profession engaged in practising civil law. Just one and a half years ago the writer published an article in a New York newspaper, on the public defender. It was, so far as he knows, the first systematic and elaborate presentation of the arguments for that officer. At first people ignored it, then gradually they talked of the idea the article embodied and advocated. They called the idea impossible, especially in New York. New York is no experiment station, said they. But eight months afterward a bill establishing a public defender was introduced into the assembly of the state, went through the committee twice, and was reported twice to the house, and failed of passing, it seems, only because at that stage the legislature adjourned.

Not a Novel Idea.

The idea is not brand new, forged hot from the furnace of thought. Further, it is more than a thought; it is a thought which has already been incarnated in life. The office of public defender is at least as old as Roman times. It was, then, not considered revolutionary in Rome. It was very helpful, and indeed indispensable. There are just as strong reasons for having such an office ourselves. And

conditions are not so different as to preclude analogical reasoning.

In Oklahoma.

It is very fortunate for the supporters of the public defender that one state in this Union has had the courage, the intelligence, and the humanity to be a pioneer among us. Old Rome has been brought into New America. And the experiment upon new soil has been eminently successful. This country owes much to women. Women are accused of being unduly conservative. The accusation is unjust. Woman has been and is sanely conservative of those institutions which conduce to the welfare of the race. But she is full of insight, full of godlike intuition, full of heart, and never hesitates to feel the call of the downtrodden and the oppressed,—never fails to listen to the still small voice of conscience, the far away cry of the weeping child, the wail of the lamenting mother, the groan of the struggling father, brother, husband, lover. Woman never made and never will make, the dollar the criterion of the justice of a law or an institution. With clear eyes, and warm, throbbing heart, she sees, and she feels. And her glory is that she acts. The country owes much to a wonderful little woman that has come out of the West. Kate Barnard—Miss Kate, as everyone calls her—has, although still young in years, accomplished more than many others, effective too, accomplish in a lifetime. She stirred the people of Oklahoma up to a pitch of action by describing in vivid colors the plight of many prisoners sent to jail without adequate representation on trial, many of them innocent, by delineating the sad condition of the young, as well as the adult, offender, by exhibiting the helplessness of the poor, the neglected, the friendless, and by showing the need of a guardian for all these. Miss Kate got what she wanted. Her department of charities and correction is one of the most famous in the land, and the public defender's office has been looked to with great concern. A great deal will depend upon whether Oklahoma has made good. Has it?

The reports of the first public defender

in Oklahoma are truly marvelous. Any of us who had doubts before have lost them now. For one thing we were fearful of the tremendous expense. Our opponents made a great deal of that. But the office has been run with a most remarkably small expenditure, and the work done has been enormously disproportionate to the cost. Cases have been handled at a cost of \$5 a piece. Several thousand have been disposed of in one year. We knew that defendants would have a better chance, not only because their lawyers would be better, but also because these lawyers would have the respect and the confidence, and hence the good will and the help, of the court. And this has been proved beyond the shadow of a doubt. We knew that the tone of the profession would be raised. And the Oklahoma attorneys have done us a good turn in demonstrating that we were right. We knew that unscrupulous proceedings on the part of defending lawyers in criminal trials would cease. And Oklahoma has shown that that was true. We maintained that poor people should be as well represented as rich people. And the public defender of Oklahoma has given poor unfortunates as good representation as the wealthiest in the state could have got. We maintained that in cases where an impecunious but deserving person lost at the trial that he should be given a chance on appeal. And on this point justice has been done in Oklahoma.

We said that in criminal cases prisoners should not be kept in cells long awaiting trials; that they were so kept because of blood-sucking attorneys extorting fees, and because of negligence, slowness, and inexpertness on the part of defenders in pressing for trial, and that the coming of the public defender would abolish that horrible state. And it has. We showed that many lawyers who had been assigned by the court to act as counsel to prisoners advised their clients to plead guilty, when they were innocent in order that the lawyers might be as little as possible burdened; and we contended that this would not be so if a public defender were in office. And our contention has been proved. On the other hand, we showed that lawyers who knew their clients were guilty, and who, if they had advised them to plead guilty to get them off with a lighter sentence, would have been heard, neglected so to advise their clients, because by the trial of an action they could make more money; and we added that the coming of the public defender would kill that class of lawyers. And it has. We fought for the thousands of friendless lives, the jetsam and the flotsam of humanity, and we have seen them come into good hands. May what has been done in Oklahoma be repeated in every state of the Union.

Robert Fenari' —

Law is not a combination of quibbles and tricks designed to promote dishonesty and sharp practice, but a system intended to compel honesty, truthfulness, candor and fair dealing among men.—Hon. C. E. McLaughlin.



NEWSBOYS' COURT IN SESSION
A. P. WAGG, Presiding Judge

Photo by Boston Photo News Co.

The Boston Newsboys' Trial Board

BY LIVINGSTON WRIGHT



THE only institution of its kind in the world, the Boston Newsboys' Trial Board is accomplishing results as efficacious as its operations are unique. While without any legal standing, the trial board is serving as a vital aid in expediting and simplifying the enormous amount of work devolving upon the municipal and juvenile courts of Boston, as well as occasionally obviating possible refuge in courts of record.

Thus, aside from the innumerable sociological and humanitarian phases of good which the board is achieving, the "decisions" and "trials" of this "court" are coming to be regarded by courts and lawyers of Boston as one of the most consequential of Boston's civic concerns.

There are over 5,000 newsboys in Boston. To direct the business affairs of these wonderful little street merchants, a systematic array of laws, regulations, and adjudications is necessarily brought into operation.

The licensing of newsboys is placed entirely in the hands of the Boston school committee. In each of the forty-one grammar and high schools the newsboys meet at stated times, and choose from among their number a captain for their respective schools. The captain is a monitor over the boys of his school, in so far as the selling of newspapers is concerned.

Now, in regulating the affairs of newspaper-selling, a mountain of court and administration business was almost constantly on hand, and the cases were, from their very fundamentals, bound to be of a largely trivial nature. A newsie was complained of for being without a license; another was alleged to be selling before or after the legal hours; another was fighting or disorderly. These three troubles are about the gist of nine-tenths of the "cases" that have to be straightened out, for to find a newsboy who will deliberately steal or deliberately do a really criminal thing is a wonderfully difficult matter. The fact being that a lad who has enterprise and stamina

enough to cause him to undertake newspaper-merchandizing on the street has, to-day, in view of the tremendous competition, to be, right at the outset, a rather remarkable lad.

Under the complicated legal system in vogue prior to the establishment of the Newsboys' Trial Board, in 1910, the following manœuvres and absurdities were unavoidable,—what Judge Harvey Baker, of the juvenile court, characterized aptly as “like employing a steam-roller to smooth out pie-crust,” and “employing all the technicalities of an ordinary \$10,000 civil suit.”

If a newsboy had a grievance against a fellow merchant for selling overtime, the complaint had to be lodged with the captain of that school. The latter then had to proceed to the supervisor of licenses, at the offices of the school committee, on Mason street. The supervisor had to go to the juvenile court and procure a summons, requiring the accused lad to appear with his parent or guardian before the court. Oftentimes there had to be a long wait while other cases were being disposed of, before the lad in question could get a hearing. In addition, were it found advisable, for instance, to take away the lad's license, all the juvenile court could do was to urge that this be done, since the ultimate enforcement of the court decisions with regard to newsboys had to be done by the corporation which had brought the licensed newsboys into existence, namely, the Boston school committee. In brief, a labyrinth of formality, technicality, and “red tape” had to be unwound in order to settle such infinitesimal, but, to the boys concerned, vitally important, matters as a nine-year-old borrowing a badge to do business on!

All of these hardships could be imposed were a lad even to maliciously accuse a comrade or rival of some petty offense. First, the accused boy was often kept out of school an entire day, or occasionally more. Second, the parent or guardian had to leave work in order to be at court (it being an imperative rule of the juvenile court that a child must always be accompanied by parent or guardian). Thirdly, a stigma was cast upon the family from the fact that the boy

“had to go to court.” Fourthly, a great amount of machinery had to be set in motion over the most trivial accusations.

Judges of courts, lawyers, sociologists, and leaders among the newsboys had long been pondering upon the question, “Is not there some way of simplifying or obviating the present cumbersome, annoying, often-distressing-both-to-Court-and-the-family-concerned squabbles of the newsies?”

On one side were ranged the brilliant graduates of the newsboy ranks, those who had endured poverty and privation eventually to reach the position where they were veritable emperors among their kind,—either distributing papers to groups of newsies who worked for them, or who by other manifestations of ability had become leaders. A few among them had even managed to study law.

These chaps knew what the “going to court”—meant, how the mother of the flock was staggered with the puzzle of “how she should ever manage to get a dress decent enough to go in.” They knew how among some of the poorest there dwelt the bitterest pride, and that with these the “going to court” would ever remain a haunting shame. The juvenile court and the sociologists, also recognized this pitiful phase of proceedings.

Out of the quandary that sense and conscience had led these splendid benefactors into, there finally emerged the project of—letting the newsboys settle their own cases! Once arrived at, everybody was wondering why such a practical, easy-to-be-tested venture had not been essayed before.

This plan was drawn up: There were to be five judges annually selected, two of them men of technical training and thoroughly experienced in sociological work among the newsboys, and appointed by the school committee. The others were to be newsboys who had been chosen by direct vote of the newsboys at large.

The present trial board consists of Alvin P. Wagg, Chief Justice, a teacher by profession and humanitarian by instinct; and Elihu Hershenson, a young man who has come out of the ranks to be a practising lawyer in Boston. These

two persons were appointed by the school committee. As associates they have the following boys, who were chosen by the newsies of the forty-one schools: Max Appel, Joseph Manevitch, and Samuel Mednick. (The captains at the various schools are always *ex officio* candidates for judgeships.)

The newsboys of Boston have a finely appointed club house, at 277 Tremont street. Here are reading rooms, gymnasium, and all the attractions that help inspire the newsboy to wish to become the right kind of an up-to-date individual. Over 3,000 newsies are members, and additions are constantly coming. In this club house, in a neat, properly appointed room set apart for the purpose, the Newsboys' Trial Board holds a session regularly on Friday evening of each week.

In approaching this board, both the accused and his parent can do so with the feeling that the judges of this court are equipped to give the rare and literal "square deal." The newsie is to appear before some judges who are actually in his calling, and who know from practical, prolonged experience its technicalities. The parent, on his part, does not have to be tortured with the fear of "the neighbors" pointing to his lad as "having been to court." He can say to himself, "Well, whatever the trouble is, this is not a criminal court, and my boy will just have to do what this court tells him, for some of the judges are newsboys, too!"

Thus, right at the outset of a "case" there is, as far as can possibly be attained, the proper attitude toward the court of "prisoner and counsel." The person who acts as prosecuting officer to the court is Timothy F. Regan, supervisor of licensed minors of the city of Boston. The clerk is William P. Healey, a newsboy.

The "case" of little Jakie So-and-so is called.

"I have here records showing that this boy, living at such and such street," says Mr. Regan, "on such-and-such date was out in front of the North Station after hours and using a badge which he had borrowed for the purpose, his own not permitting that."

Justice Wagg has, meantime, been

quietly gazing at both the lad and his mother. He notes that the lad is neat and has a good face. He is so young, too! Only nine years. The prosecutor, after reviewing the facts, says: "I find that this boy is well spoken of by his teacher, and is a well-behaved boy in selling papers. I would suggest that as this is his first appearance here that the penalty be made as light as possible."

Justice Wagg then says: "Now, I hear that you are well spoken of, and so I am going to give you the lightest possible penalty. I will put you on probation for one week. And," handing the child a copy of the statute paragraph on the rights and duties of newsboys (printed on a single sheet for this purpose), the court adds: "Now, tell your teacher to please give you a sheet of foolscap, and you copy off this paper, and bring it down here next Friday evening. Your mother need not come with you. You understand now, do you, that you must never borrow and use a badge to which you have no right, and that you must not sell after hours?"

The child says, "Yes, sir," but it has required some little explanation and urging to get this fact clear to the child's understanding. The "case" has made it patent that this nine-year-old citizen had already taken a little of the doctrine that "it don't matter how you got it, just so's you got it!"

Justice Wagg, before dismissing the "case," says to the mother, a woman, sweet-faced and an evident lady in spite of her cheap clothing, "You will see, will you, that this boy is not out after hours?"

She adds a respectful, "Yes, sir," and the "case" of Jakie So-and-so is ended.

Now, contrast this humane, educative, and noble method of correcting a tiny offense with the monstrous performance once in vogue,—a policeman dragging the child to a criminal court! The juvenile court finally came into existence as a mighty effort to save erring or unduly mischievous boys and girls. The Boston Newsboys' Trial Board goes the juvenile court one better!

The next "case" is a tough one. The lad, rosy-cheeked, handsome, but whose brilliant, furtive black eyes betray a mind of remarkable keenness. He is almost

thirteen. Before the trial board he is a veteran visitor. His first appearance was away back last May. Sometimes he "showed up" while on probation, and occasionally he didn't. His attitude as he stands in front of the board betrays just the tendency of mind and heart he has. He bends forward, intent on catching every word and intonation, —and taking advantage of the same. It is clear that the court regards this boy as a puzzling customer. Here is the lad of keen mind and wilful persistence,—the kind that makes either the clever crook or the successful business man.

The board, however, sees improvement. The boy has not missed probation appearance for some weeks, and he has his face clean to-night. His fists are not quite as clean as they might be.

Justice Wagg decides upon the wise course of striving to induce the lad to keeping on "improving" in deportment because he wants to be respectable, and not because the trial board is forcing him to "improve." With just a compliment that "your face is clean, and you have lately been prompt in reporting to the court, and now if you can agree to get in a little more scrubbing on your

hands, and be here next Friday evening," the court lets him go.

The boy smilingly says, "Yes, sir," and glides away.

These two sample "cases" will serve to show the extreme delicacy of administering justice in the Boston Newsboys' Trial Board. This unique justice-administering body is making a remarkable success with an exceedingly difficult phase of justice,—necessity. To cope with the childish mind, minds that are, also, being reared amidst poverty and hardship, and mete out a form of justice that shall be admitted by the childish recipients as justice, is a task that often requires the subtlest powers of the finest intellects and most experienced individualities. How superbly the trial board and Supervisor Regan are doing their work is proven by the astonishing fact that the board almost never is forced to let one of its "cases" go up to the juvenile court:

May its grand work of helping the court and humanity proceed in its present success!

Livingston Wright

To say that we live in a wonderful time is trite, but true as it is trite. The nineteenth century was called the wonderful century. The twentieth century bids fair to eclipse its predecessor in wonders, and the first decade only has yet passed. "The moving finger writes, and having writ moves on." Thus wrote the Persian philosopher poet centuries ago. It was true then and true now.

The finger of human progress is always writing and always moving on. It never repeats and it never obliterates. What is written is written, whether it be for good or ill.

In this second decade of the twentieth century it is writing many things of surpassing interest, but the three words which it writes and which overshadow all others are the words "Education," "Democracy," and "Service."

—Hon. John B. Winslow.

The Trial Lawyer

BY COLONEL WILLIAM HOYNES

Dean of Law Department, University of Notre Dame



MY ideal of a lawyer, whether in court or in his office or in the routine of his customary civic duties, may seem to be too exalted and exacting under existing circumstances. Nevertheless, it is none too high for the honor, efficiency, and good repute of the legal profession. In fact, it does not appear to be discouragingly remote in the domain of achievement, for to it countless numbers attain and countless others aspire.

Its primary requirement refers to educational equipment, and it contemplates that this should be at least commensurate with a lawyer's realized or assumed standing in the profession.

While the law is at least nominally a learned profession it ought to be such in reality, and indeed foremost in that line. To strive earnestly to make it such should be the aim of all worthy disciples of Themis.

While in a broad view the law is boundless in space and time, yet in a narrower sense it is the essential basis of government and civilization. Its absence would produce chaos. Its subversion would mean anarchy. And this would destroy the state, wreck all semblance of government, distribute among individuals each for himself the authority and sanction of law, force every person to depend upon his own vigilance and fighting qualities for personal security and protection, break down the barriers of restraint upon crime and pillage, obliterate the idea of private property, discredit industry in rendering it dangerous to accumulate the products of toil and tend inevitably to restore the "stone age" in the recurring experience and tentative groping of mankind. Liberty and safety, prosperity and progress, civiliza-

tion and government, are but creatures of the law.

All good citizens intuitively turn to it as the bulwark of their protection, the assurance of their progress, and the promise of their peace, welfare, and happiness. But especially does the lawyer recognize from this point of view the grave responsibilities devolving upon himself and his profession. This consciousness is attended with a sense of obligation that should inspire him to devote his best energies toward becoming an ideal lawyer, honoring the profession by his ability and high character, and serving the community with unselfish zeal and high moral purpose in all his civic relations.

As an ideal lawyer he ought to be a man of kindly and sympathetic impulses—a man spontaneously disposed to despise injustice and side with the right under all circumstances. He ought to be self-respecting, dignified, honorable, trustworthy, tolerant, patient, and chivalrous in his relations with others—with clients, members of the profession, and the general public.

I am reminded, however, that it would be impracticable, in view of the limitations of time and space, to give so broad a scope to my theme, and hence shall confine it to remarks pertinent to your February symposium, "The Lawyer in Court."

Trial Lawyers.

It would be superfluous to inquire what proportion of the profession falls strictly within the meaning of this caption. It may be said, generally speaking, that all lawyers appear in court at times, and yet the vast majority of them seem to prefer what is called "office practice," and very seldom participate in court trials.

In the larger cities less than a third

of the bar membership can fairly be ranked as trial lawyers. A firm comprising several partners usually deposes one of them to represent it in court work, while the others perform the multifarious duties constituting what is called office practice, such as preparing the pleadings, procuring witnesses, taking depositions, instituting suits, making necessary motions, getting cases ready for trial, perfecting appeals, writing briefs, collecting judgments, preparing contracts and other instruments in current business, doing the correspondence work and attending to the varied demands of a law practice extending at times to distant cities, states, and foreign countries.

The partner chosen to do the court work may be engaged day by day in the trial of cases. He depends mainly for his knowledge of them on the summary briefs submitted by the office force, which outline the facts and name the witnesses subpoenaed to prove them.

His familiarity with the work tends manifestly to facilitate its performance and enable him to comprehend readily the salient points of each case. The drudgery of preparing it gives him but little concern. His duty is fulfilled in trying it creditably in court.

But such distinctions and divisions of work are not predicable of the practice in the smaller cities and towns, or where the volume of business is comparatively limited. In such places men practising by themselves must be their own trial lawyers, unless they secure temporarily the co-operation of more experienced counsel. But when in partnership the court work may have the preference of one and the office practice that of the other. Necessarily, however, even in such instances the case is prepared for trial in the office, and both partners, with all their clerical force, may find it necessary to participate in the work of preparing it. Moreover, if both partners are familiar with and fairly proficient in court work the two are usually associated in the trial. And so they ought to be if the case is considered complicated, difficult and doubtful.

Preparation for Trial.

Whatever the system in vogue a law-

yer in court ought to be thoroughly conversant with his case in all its aspects. In comprehension of the facts and knowledge of the law, he should be pre-eminently the master of the situation. Otherwise he could not understand and develop it with assuring results. The obscurity of ignorance or the muddle of carelessness gives no warning of the bewildering pitfalls awaiting every incautious step in the progress of a trial.

He should be able to state his case so clearly to court and jury that, on hearing it, all doubt or obscurity in respect to it as a whole or as to any of its elements would be cleared away. He should remember that the case is not known either to the court or to the jury, and that the more lucidly he makes it known the more deeply it will take root in the minds of his hearers.

Study of Pleadings.

By a close study of the pleadings he can determine with approximate accuracy what the plaintiff and defendant will seek respectively to prove, and then he may pursue his investigation and marshal his facts accordingly. Moreover, a searching study of the pleadings would be serviceable to him also as an authoritative survey of the scope of the evidence. They may be viewed for purposes of comparison in much the same light as the basic figures in a mathematical problem, the solution of which is to be worked out through the evidence. In the mathematical problem a single superfluous, incorrect, or omitted figure would lead to an erroneous solution. And so as to a single incorrect element of material consequence improperly admitted into the evidence during the trial. A judgment resting upon it would be subject to reversal in a court of review.

The better the pleadings are understood the less danger there will be of aimlessness in developing the evidence or permitting the opposing side to introduce testimony or documents not pertinent to or warranted by the issue.

Self-Control.

Alertness of mind, quickness of discernment, soundness of judgment, and a calmness or self-control capable of sup-

pressing manifestations of emotion or annoyance are among the most essential attributes of a successful trial lawyer. He must be tactful and sagacious, and observe with keen perceptive power, backed by a retentive memory, every flaw and assailable opening left by his adversary in developing the evidence. He must never lose his temper or allow his emotions to betray him, even though closely pressed or actually reached by the foil of his antagonist.

Selecting a Jury.

In selecting a jury he lays greatest stress upon ascertaining whether its members are honest, unbiased, and without knowledge of the facts or parties in the case. He runs no risk of arousing hostility or prejudice against himself by prying wantonly into their private and personal affairs. And particularly scrupulous in this particular is he when his challenges are gone, unless he has a sure footing in challenging for cause. He is ordinarily and perhaps wisely disposed not to leave on the jury while he has a challenge left anyone whom he has evidently offended or for whom he has on some account conceived a dislike. Frank and cordial with the jury, he may usually count on the reciprocal trustfulness and good will of its members.

Statement of Case.

In the statement of his case to the court and the jury he should be so perspicuous in presenting the facts, following the narrative style in the interest of clearness and consistency, that it would stand out as distinct as a picture limned on canvas by an artist hand. Logically, lucidly, luminously, should this be done. Thus done it would make a deep impression on their minds, and whatever might subsequently be developed in the evidence would readily find its proper place in the remembered narrative.

Examination of Witnesses.

During the examination of the witnesses the concentrated attention and searching vigilance of the trial lawyer are indispensable. The manner of the witnesses, their facial expressions, their readiness or hesitation in answering

questions, their eager friendliness to either side or apparent impartiality or indifference, their positiveness or uncertainty as indicating their grasp of the facts and showing the condition of their minds, and innumerable other matters, should be scrutinizingly observed.

What is seen in these particulars, supplemented by alert reasoning powers, may enable him to reach a prompt opinion as to whether a witness is telling the truth or prevaricating. If he cannot depend upon memory to recall the lapses, inconsistencies, and contradictions disclosed by the examination, he should jot down in writing such apt references to them as may serve him in the cross-examination and address to the jury. A judiciously conducted cross-examination is properly viewed as a terror to fraud and mendacity in a case. But in it the narrative order of facts or statement should usually not be followed.

Examination of the Law.

Not only should the trial lawyer be able to anticipate in the main his opponent's side of the case and be prepared with evidence to overcome or weaken it, but he should also make a searching examination of the law applicable to it. The authorities supporting his own contention will of course be diligently sought and carefully chosen, but those favoring the other side should likewise be found and critically studied. He should ascertain the doctrine for which each case may be cited as an authority, and not suffer possibly mere *dicta* to be used against him. He should know whether the authority is strong and pertinent or practically worthless on account of having been overruled as to the point in issue, or weakened and discredited by reason of its having been criticized, distinguished, or limited in its application by later opinions of the reviewing courts. He should know whether it is the opinion of a united or a divided court and in consonance with reason and principle. Such information he should acquire with scrupulous care, and be prepared to show the court what value may properly be accorded to it as an authority.

All such *data* as to the evidence and the law ought to be thoroughly known,

so that he may correct the court in matters of doubt and stand firm against unwarranted claims or assumptions of counsel on the opposing side.

Ethical Conduct.

No lawyer should be wanting in familiarity with the accepted rules of legal ethics, and these should be supplemented by his own sense of honor, probity, and manliness. Thus must he be actuated in measuring up to the ideal standard. In such case to the court and professional brethren his given word is truth, his promise a bond. To jury, witnesses, and court officials he is ever a gentleman in what he says and does. To his client he is as courteous and considerate, devoted, and loyal, as though his own personal honor and property interests were involved. He realizes that his conduct as a lawyer in court and before the public bespeaks his standing in the profession, and that he degrades it as well as himself by doing things forbidden by its proclaimed principles and moral code.

Indoctrinated in its principles, which unerringly distinguish between right and wrong, he becomes a pervert and traitor to it if he deviate from its guidance and repudiate its teachings, morbidly choosing or casually falling into a course of chicane and mendacity, dishonesty, and dishonor. Though presumptively imbued with its wholesome spirit and lofty aspirations, yet in degenerately choosing for his activities a course of humiliating shame and disgrace he belies his years of legal study, the moral training necessarily incident to such study, the solemn oath of fidelity to professional duty at the threshold of admission to the bar, and the ethical code prescribed in the light of experience for his guidance and the welfare and safety of the public.

How different the lawyer whose conduct undeviatingly illustrates the enduring sense of right which is at once the foundation of the law and the true test of fitness for its study. The ancients believed the law to be God's greatest gift to mankind. Their belief in the matter took a form similar to our own in respect to the origin of Revelation. Considering the law as right reason, it is rather creditable to the modesty of the human mind to ascribe a Divine origin to it. And it is a truth almost axiomatic that the mind which most readily grasps the distinction between right and wrong, leaning intuitively to the right, gives promise of attaining to the highest possibilities in the domain of law.

Every lawyer proud of his profession and seeking to do it honor knows that as a student of the law he became imbued with its spirit and moral precepts, and that these strongly tended to fix the form and trend of his character. He studied law with a just appreciation of its claims on his conscience. He served in its temples with a becoming reverence for its justice. He believed that he could not be worthy of it without responding in thought, word, and action to its teachings. He knew that he could not be true to these without exemplifying by his services an exalted sense of devotedness to his profession, fidelity to clients, loyalty to friends, cordiality to co-workers at the bar, and unfailing courtesy, integrity, reliability, and manliness to the general public in all civic concerns.

Honor to him who has attained to that ennobling ideal. Encouragement and good will to him who aspires to it.

William Hynes.



The High Art of Cross-Examination

BY COLONEL W. A. HENDERSON



I AM going to say some things to you that I wish some older lawyer had said to me when I was a young lawyer, because there is so much information needful to a lawyer that is not found in any book nor taught in any college. He must absorb it. He absorbs it where I have lived for forty years and more,—in the courthouse. Nobody has ever printed it, and it is good for any young man to listen to what I would say. It would be worth a new code, if he would take it and digest it. I want to talk to the young lawyer.

Let me describe that young lawyer to you. In the first place, this ideal lawyer ought to have a strong physical body. Lawyers do not look enough to that. If he is ever successful in this world, his best chance is from his own physical body. Ole Bull never could have made a great reputation unless he had a good fiddle.

I am going to describe this lawyer to you:

He is the son of a poor man,—generally. He is not born and reared in a great city. It so happens that the men who rule in our profession, and in all other departments of life, are, as a general thing, the sons of poor men. It so happens that the son of the shoemaker, or the son of the carpenter, throws down the son of the millionaire and takes his things away from him; and you can't prevent it. Occasionally I have had the great pleasure of finding the sons of rich men striving like giants in our profession, or in finance, or in government; but, as I said, the rulers come from the country,—the sons of the farmer, the artisan, the mechanic. Occasionally I have met an exception; and when I do, I feel like taking off my hat to him, because it is a rarity indeed. There are so many dangers that beset the son of the rich man

that it is almost as impossible as to get through the eye of a needle for him to get into either the legal profession or into heaven,—very, very much the same.

In the next place, he should be physically and mentally brave. The thing that clients prefer most in their counsel, pay higher prices for, the thing they need, is courage. You never knew a man in your life who would bet on the dog that went into a fight with his tail between his legs. You want a brave man who will stand up square and fight; who will take hold and hold on until it thunders. You can tickle a client that way better than with a regular collegiate education. But I want my boy, of whom I am speaking, to be an educated boy. I want him to have gone through the schools. The best avenue, in my opinion, of education is the regular school and college. Many an uneducated man has attained eminence, but it is so hard for him to do it. And I never knew one in my life but that he wanted his son to avoid these hard and stony paths.

The best education for the young lawyer, I think, is something that I did not have; and that is, to go through a regular law school. I think it is the best way. Many good lawyers have never done this. But armed in that way, or in some such way, he is best equipped for the battle of life.

To the young man who comes into our profession, I am, in some degree, qualified to tell some of the things that he will not find in any books. One of the greatest navigators that ever lived was Commodore Maury, and one of the ablest teachers. I think in some respects he was the leader of them all; but I wouldn't go on a boat he was piloting to "The Suck" unless I had a life saver on. I would rather risk myself with some codger who knew things; who knew the swirls and the sucks; who could look at the heavens and tell when they portended rain, and tell where the wind was coming from, and could handle his craft and

bring it back to Chattanooga all right. You never knew a steamboat pilot who could read Latin.

Now, I have taken boats up the rivers of litigation in this end of the state, to their sources, for a great many years. I have been hung on many a sand bank—and bar—and I know where it is safe to go and where it isn't, from experience, because I have been there.

Imprimis, I want to say to the young lawyers: Never go into a lawsuit until you thoroughly understand it, until you have got the plan, until you know what to do. No architect has the folly to haul a single plank to the building site until he knows what sort of a house he is going to build. God Almighty has hidden in every fragment of marble a more beautiful Apollo than Praxiteles ever chiseled. All you have to do is to chip away the stone, and the Apollo is there. Now then, plan your lawsuit, get an idea of your plan, and know what you are trying to do. The best way to develop litigation, in my opinion, ordinarily, is to develop it in the order of time. Commence at the beginning and go down in the order of time, interval succeeding interval—as I have done many a time. My plan has always been, in some sort of way, as well as I could, to formulate my argument after the manner of a house. It so often happens that a lawyer leaves things out, forgets them, or gets them tangled and twisted. If he puts them in the order of a house, he will not do that. Here is the front door, there the parlor, the bedroom, the sitting room, the upstairs, the cupola. Another habit of mine (which I give merely as a personal matter) is never to take down any notes as the witness is testifying. I just say that I never take notes. I have known good lawyers, for instance, good old Judge Tom Nelson, who would write down every word in long hand. Such an one delays the court. That was his invariable custom. I have tried many a lawsuit with him; his method scatters the attention and weakens the plan. It is like a builder tearing up every plank as he puts it down. In my opinion, it weakens the memory. Now that is merely for your consideration.

After you shall have gotten into the

trial of a case, in my opinion, the highest test of a lawyer is the presentation of the case to the court and to the jury. There are a great many things that I think I know. There is one thing that I know I know; I know a lawyer when I see him in action. I know a lawyer, like a Kentuckian knows a horse. He looks into the horse's mouth, lifts his foot, walks him around, and says: "Trot him up the road, boys, and let me see him in action." There is no greater test of ability as a lawyer in any court than in the presentation of the case to the court and jury,—in equity or nisi prius.

My little daughter (who is no longer little) while playing with her building blocks at home, when she was a little tad, once interested her mother very much by announcing that she could take the blocks on the floor and manipulate them so as to spell "G-o-d," and could take the very same blocks and make them spell "d-o-g." And it is the same way with a lawsuit,—it depends upon the order in which you present your facts to the court and jury.

Another thing, my young man (I am talking to just one man—the one I have described, and the balance of you may listen); your main capital is confidence. If you ever succeed, it will be because the people have confidence in you. That is a plant of slow growth. The last man on earth you ought to deceive, or try to deceive, is the judge of the court. You cannot do it without being found out, and when you are found out, your stock goes down to fifty cents on the dollar, although he may not tell you so. The judge will find out a lawyer sooner than any other man in the courthouse.

Neither ought a lawyer to deceive, or try to deceive, the jury. His whole effort ought to be to develop the truth, just as analysis would prove whether eyeglasses are rimmed with gold or brass. It would tell the truth. I have heard a lawyer boast that a certain case had been presented to a lawyer and he turned it down; that the man then brought the case to him; that he put it into court, gained it for him, and got some money. That is a mighty dangerous thing to do. It is a mighty lucky thing if the first law-

yer don't tell on you, if you gained that verdict by a little twistification. The man for whom you gained the lawsuit has lost confidence in your integrity, and the more it is talked about, the wider the zone in which it will be discussed against you. No lawyer ought to boast of such practice, for there is always a suspicion that he has gained a case that he ought not to have gained. He may succeed, but he has a brand upon him that he will carry all his life. And yet I have heard young lawyers boast about this.

Either in equity or, more markedly, in *nisi prius* cases, in the examination of witnesses, I wish to tell you my conclusion, that, in my opinion, there is not so much perjury in the courthouse as people generally suppose there is. I mean straight-out perjury; though it sometimes happens. The great majority of witnesses try to tell the truth—many of them to the best advantage. Nearly all witnesses are partisans. There is a widespread opinion (how it got started, I do not know, but it certainly exists) that a witness is supposed to be on the side of the fellow who summoned him, and that it is his duty not to tell a fact within his knowledge to the detriment of his side; and it is answered by the excuse that he was not asked that question. And so witnesses generally are the partisans of the party who has summoned them.

A mighty good thing for a lawyer, when trying a case, is to get in the jury box; that is to say, get in mental and moral touch with the jury. I don't mean that he ought to go and sit with them; but, as nearly as possible, occupy the position of the jurymen who is trying to ascertain the truth of the case, and throughout your examination show to him and to the court that you are trying to develop the truth. Unless you do that, they are always entertaining a suspicion of you; and sooner or later you will be known as a trickster, and a man that it will do to watch. Many lawyers are proud of that distinction; and they live and die in the low grounds of sorrow, and never get up on the high hills.

Do not introduce your witnesses alphabetically. Don't call on your client to know who the next witness is, as is often done. But you, as the architect of

your house, should know what upright you want there and what crosspiece here, or whatever other material is needed at the time, and call for it. You must know the witness who has the evidence you want at the time, and produce him.

Now we come to the examination. Remembering what I have already told you, bear this in mind, young man; that it is not sense that moves the world. The lever that actuates the world in all great movements is not sense; it is sentiment, devotion, love, faith.

Wherever a lawyer can get hold of a sentimentality or a devotion that comes his way, he ought to grab at it like a drowning man would at a straw, and hold on. In the excavation of Pompeii, the most wonderful thing discovered was the body of a Roman soldier, clad in armor, a spear in his hands at a "charge," as he stood there defying that thunder and fire and brimstone and ashes until he died—on guard for Rome! That is the sort of man who wins. When there springs up any question of sentimentality in a lawsuit, and it comes in a thousand ways, it is worth more to you than the multiplication table is to the school-teacher.

Now, in the examination of witnesses, let me warn you, young man, that the most ignorant person of all is the young lawyer. I know what I am talking about, for I have been there myself. You can hardly prevent a young lawyer from thinking up a fine question. He racks his brain for something brilliant; he thinks up a searching question. He really is not for gaining his lawsuit as much as he ought; he wants to exhibit himself as a great man,—and he is not. Such is the trouble with most young lawyers.

Another thing that no book has told you: The most dangerous thing that ever confronted a lawyer in his trial of a lawsuit is what is called a "swift witness." That is a quicksand that will sink with you and you will be engulfed. When you find a witness pulling like a cart horse, if you will keep prodding him, he will pull more and more until he will out-pull himself.

I remember a great many years ago I was trying a lawsuit up in Fentress county, in the big city of "Jimtown." A

Mrs. Phillips was a witness. They had prodded her and prodded her, and every time they hit her she would make a fresh jerk and tell something more; then they would hit her again, and she would make another effort. Finally the lawyer got tired and turned her over to our side. I said: "Mrs. Phillips, there is just one question: Mrs. Phillips, before you went on the stand as a witness, didn't you swear that, in this case, you would tell the truth, the whole truth, and nothing but the truth?"

"Yes, sir," she snapped at me.

"Well, do you think you have kept the contract?"

"Yes, sir," was the answer, "and a leetle the rise."

How many beautiful questions a young lawyer could think up to ask that witness—astonishing questions, as thick as blackberries. My question was: "Stand aside." We didn't hear anything more from Mrs. Phillips, nor from her evidence.

I recall also an incident which my friend Judge Ingersoll has described in his memoirs of John Netherland, the greatest advocate I ever knew in Tennessee. Though there was a great deal of law that he did not know, yet he never admitted it. There was a case on trial where the advocate represented a case against the defendant, who introduced as a witness 'Squire Melton,—as honorable, high toned, and high standing a man as there was in Grainger county, but whose testimony injured his case very materially.

I happened to be present at that trial. The witness was turned over to Colonel Netherland for cross-examination, and he did it in this style:

"Squire Melton, you are a brother-in-law of the defendant?"

"Yes."

"This evidence of yours—did he get it up; or was it a scheme of your own?"

"It was a scheme of my own, sir."

Colonel Netherland was wise enough to say only:

"Stand aside!"

Many a good question could have been thought up by a young lawyer to ask that witness,—many a one. And every

time he asked one, it would kick harder than it would shoot.

As a rule, develop in the shortest way the information and the prejudice the witness has, especially if he is against your side. It is easily done. Do it as easy as you can, and as soon as you have done it, let him alone as quickly as you can.

Sometimes you will find a witness committing straight out, wilful perjury,—sometimes, not often. When you find that, unsheath your sword and go for him, hip and thigh! You will have the sympathy of the court, and you will soon catch the sympathy of the jury. That man must be slaughtered. That does not happen so often as people outside of the courthouse imagine; yet it does happen. I remember once a bill was filed in the Chancery court at Knoxville against several people there, sureties on the bond of an insurance agent. In that bill a certain theory was set up. Then the complainant brought another suit, and got service of process in Memphis, where the plaintiff resided, in the circuit court of Shelby county, and it was on an entirely different theory from the case pending at Knoxville. He was sharp enough to dismiss his case at Knoxville, in chancery, and pursue it at nisi prius at Memphis. So we traveled down there and prepared to fight it out before Judge Heiskell. I was accustomed to the mountain way of practising law. They had a habit there of asking for instructions—number one, number two, and so on. They raised the objection on me that I had asked for no instructions. I replied: "I am not familiar with this sort of practice; but I will ask your Honor to instruct the jury that it is their duty to inquire into and report which party ought to gain this lawsuit,—the plaintiff or the defendant." His Honor said he thought that ought to cover it.

Well, the man was put on the stand to testify in the nisi prius case, and his testimony was in direct conflict with his bill in chancery at Knoxville. In a few mild questions, I clinched the nails on that evidence, so that he could not back out of it. Fortunately I had brought with me the bill that he had dismissed at Knoxville, and after I had clinched that

so that he couldn't get away from it, I walked around in front of him. He was one of the most prominent men in Memphis. Showing him the bill, I asked:

"Is that your signature to this bill?"

"Yes," he replied, looking at me.

"Did you swear to it before a notary public?"

"Yes, I did," was the answer.

"Well, then, Major Smith" (for that was not his name), "kindly tell this jury where it was that you swore to a lie,—Was it at Knoxville, or was it here before this jury, or was it both places?"

As I started back to my seat, I heard a disturbance behind me; as I turned hurriedly to see what was the cause, the sheriff had caught the witness as he was falling to the floor in a faint.

There were no other questions asked. The court adjourned pretty soon, and they came in and dismissed the case.

What a heap of good questions might have been asked along there, if one enjoys paddling in the water. It looks pretty and is great sport to make the water pop and fly, as many a young lawyer would have done.

Some two years ago I was in New York city, overlooking the taking of some depositions in the case of a lady who had instituted a damage suit against the railway company by which I was employed. She lived in Tennessee, and was traveling through Virginia. There had been a heavy rain that had washed a lot of sand down upon the track. The locomotive ran up on this sand, and quietly and sweetly turned over. Nobody was hurt, so far as we could tell, except this lady. For many years theretofore she had been under treatment for some ailment to one of her limbs. She was on the way to her specialist in New York then for further treatment of this limb. It was the deposition of this specialist that we were taking. Our counsel in charge of the case was conducting the cross-examination. The learned doctor told all about her present condition; how she was permanently injured, etc., etc. He made it as horrible as a damage doctor can—and they are getting as expert these days as the damage lawyer along those lines. Finally they turned this physician over to us for cross-examination.

Our counsel went on and developed her condition before as being very similar to that in which she was at present, and the fact that she had been on her way to her doctor for treatment at the time of the accident complained of. The witness testified all right as to what the condition of this good lady was, and all that. Our counsel turned to me and said in a low voice:

"The other side didn't ask him whether or not her present condition is due to the turning over of that car, or whether it was due to the old ailment. Shall I ask him?"

"No, don't you do it."

"Yes," he said, "I think I had better; I think I shall. I believe that will end the lawsuit."

"So do I," I replied.

"Well," said he, "he is obliged to say it—he is obliged to say it."

"Remember he is her doctor; he has been getting her money. I believe it is a fine question to ask, but I would sooner ask it of the jury. The jury can't explain it like that doctor can." But still he insisted:

"Well, I will take the responsibility," he added.

"Very well, you are in charge. Ask it—and then will come the deluge," I told him.

So he asked the question, and the doctor said:

"Yes, she had that ailment, but I thought she was completely cured of it. She was so severely shaken up in this accident that it has turned the whole thing loose worse than ever."

That was a fine question; a very learned question! It was a costly question, for I came back home and paid her \$10,000 damages.

Wherever there is developed in the case crookedness or incompatibility or discrepancy or something contradictory, my young lawyer, you let it alone right there.

Therefore I say to you, young man, the best advice ever given to a cross-examiner is, again and again, "don't!"—By permission, from address before Tennessee Bar Association.

Arguments from Authority

BY EDWIN BELL, L.L.B.

Author of "*Principles of Argument.*"



I N these days of a growing number of judicial decisions, of legislatures, of the conflicts of decisions and of jurisdictions, not the least important task of the advocate in court is the argument of questions of law. What does this task consist in? It is, briefly, to establish a principle which the court is willing to recognize as the law applicable to the facts.

In a trial before a judicial tribunal there are always two questions;—a question of fact and a question of law, one or both of which may be disputed and form the subject of an argument. When a question of fact is disputed it may be established by evidence, the object of which is to bring the facts within the scope of some legal principle.

When, on the other hand, the principle required by the facts is disputed, it is to be established by an argument from authority, which may be a simple reference to authority when the principle required has been already declared, or it may involve an elaborate process of reasoning where the principle required has not yet been declared to be law.

Arguments from Analogy.

When a judicial decision in any particular case is rested upon a prior decision which was made with respect to the same kind of facts and which is thus a direct authority, the prior decision is said to be "followed." But if the facts are not the same, but only more or less similar or analogous, the prior decision is said to be "applied;" and the argument to establish the new principle takes the form of an argument from analogy to show that the two cases are parallel. For example, it has been held that where the

owner of a coal mine crosses the boundary of his property into an adjoining mine, and takes coal therefrom, he is liable to damages, the measure of damages being the value of the coal at the pit's mouth, not deducting the cost of severance. *Bulli Coal Min. Co. v. Osborne* [1899] A. C. 351, 68 L. J. P. C. N. S. 49, 80 L. T. N. S. 430, 47 Week. Rep. 545.

This principle has been extended by analogy to the case of the owner of timber limits who cuts timber on the land of an adjoining owner, and who was held liable for the value of the timber after severance on the property without deducting the cost of severance. *Union Bank v. Rideau Lumber Co.* 4 Ont. L. Rep. 721. The facts of the two cases are not the same, but are nearly allied, and the rule in the one case was extended to cover the facts in the other. In many, perhaps in most, cases in which questions of law come up for argument, no direct authority exists by which the case in question may be determined, and the problem is to find an authority which may be extended and applied.

Principle of Justice.

In the absence of any principle enacted by statute or declared to be law by judicial decision which can be followed or applied, resort must be had to the comprehensive principle which lies at the foundation of all systems of jurisprudence, and which may be stated as follows:

Whatever is just as between the parties, and not contrary to public policy, should be declared to be law; or, to put it negatively, whatever is unjust or contrary to public policy should not be declared to be law. Justice may be said to include whatever is right, fair, equitable, reasonable, humane, as opposed to

what is wrong, unfair, unreasonable, absurd, cruel, or oppressive.

This fundamental principle of the common law is implicit in the whole system, and was expressly recognized by Lord Mansfield in *Millar v. Taylor* (1769) 4 Burr, 2303, in which the question to be decided was whether an author could restrain the publication of his own work by another before he had published it himself. The decision was put on the grounds that "it is just that an author should reap the pecuniary profits of his ingenuity and labor. It is just that another should not use his name without his consent. It is fit that he should judge when to publish, or whether he will ever publish. It is agreeable to the principles of right and wrong, the fitness of things, convenience, and policy, and therefore to the common law, to protect the copy before publication."

In *Bird v. Holbrook* (1828) 4 Bing. 628, 25 Eng. Rul. Cas. 97, the question arose whether the owner of land who had placed spring guns in his garden, without giving any notice that he had done so, was liable to the plaintiff, who entered the garden in pursuit of a stray fowl, and was injured by the discharge of one of the spring guns. It was held that "it is inhuman to catch a man by means which may maim him or endanger his life."

The purpose of a system of jurisprudence is to secure justice to the individual in so far as that does not interfere with what is usually called public policy, or in other words, the convenience, advantage, or well-being of the community as a whole. As laws are made by the community it is natural that the interest of the community should be paramount, and that justice to the individual should be subservient to and controlled by those wider interests. Sir William Scott says, in *Evans v. Evans*: "The repugnance of the law to dissolve the obligations of matrimonial cohabitation may operate with great severity upon individuals; yet it must be carefully remembered that the general happiness of the married life is secured by its indissolubility. In this case as in many others the happiness of some individuals must be sacrificed to the greater and more general good."

In *Scott v. Stansfield*, L. R. 3 Exch. 220, 15 Eng. Rul. Cas. 42, it was held that no action lies against a judge for a slander spoken in his judicial capacity, even though spoken maliciously. The plaintiff suffered an injustice, but it was held that justice to the individual must give way to the public interest in such a case. "It is essential," said Chief Baron Kelly in giving judgment, "in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely. This provision of the law is not for the protection of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences."

In *Sunbolf v. Alford* (1838) 3 Mees. & W. 248, the principle contended for by the defendant was as follows:

"Every innkeeper has a right to detain the person of his guest, and to take off and detain his clothes as a pledge to secure the payment of his bill."

The court decided that the principle was unsound on the ground that it would lead to absurd and monstrous consequences. Lord Abinger said: "If an innkeeper has a right to detain the person of his guest for nonpayment of his bill he has the right to detain him until the bill is paid, which may be for life. . . . The proposition is monstrous."

Parke, B., said: "If the innkeeper take the coat off the guest's back, and that prove to be an insufficient pledge, he may go an and strip him naked, and that would apply to either a male or to a female. That is a consequence so utterly absurd that it cannot be entertained for a moment."

Bad Law.

An advocate may have to argue that a decision which is a direct authority against him, although it has been accepted as law and followed in numerous cases, was wrongly decided, and is what lawyers call "bad law," and should be overruled.

The case of *Mills v. Armstrong*, L. R. 13 App. Cas. 1, 57 L. J. Prob. N. S. 65, 58 L. T. N. S. 423, 36 Week. Rep. 870,

6 Asp. Mar. L. Cas. 257, 52 J. P. 212, is an instance in which a previous decision in *Thorogood v. Bryan*, 8 C. B. 115, was overruled on the ground that that decision was opposed to principles of justice. In *Thorogood v. Bryan* the personal representatives of a deceased person brought an action against the owner of an omnibus by which the deceased was run over and killed. The omnibus in which the deceased had been carried had set him down in the middle of the road, instead of drawing up to the curb; and before he could get out of the way he was run over by the defendant's omnibus, which was coming along at too rapid a pace to be able to pull up. Both drivers were found guilty of negligence, but it was held that the plaintiff was not entitled to recover, on the principle that a passenger 'identifies himself with the conveyance in which he is traveling, and if the driver is guilty of negligence his fault is imputed to the passenger.'

In *Mills v. Armstrong*, a collision occurred between the steamship *Bernina* and the steamship *Bushire*, the result of which was that *Armstrong*, the first engineer of the *Bushire*, was drowned. The collision was caused by the negligence of those in charge of both ships, and the action was brought by the personal representatives of *Armstrong* against the owner of *The Bernina* to recover damages for his death. It was argued that the plaintiff could not recover on the principle laid down in *Thorogood v. Bryan*. But it was held by the House of Lords that the case of *Thorogood v. Bryan* was wrongly decided, and the principle of it was overruled.

Statutory Construction.

If it be a question of statute law the inquiry becomes one of a much more restricted range (than a question of common law); it is then simply a question of construction, and none of those general considerations (moral right and wrong or general expediency and convenience) have any place except as far as they serve to illustrate the meaning of the language which the legislature has chosen to employ; and it is obvious on this principle that when the legal, ordinary, and grammatical sense of the language is un-

ambiguous, these considerations are wholly irrelevant,—they cannot alter that sense, which must prevail. Judges must take the law as they find it, and if it be unjust or inconvenient, it must be left to the constitutional authority to mend it. *Garland v. Carlisle* (1837) 4 Clark & F. 693, 11 Bligh, N. R. 421.

In the following judgment of Justice Day of the Supreme Court of the United States, the word "copy," as used in the copyright act, received a judicial interpretation, and the principle was laid down that that word does not include or apply to perforated rolls which, when operated in connection with a mechanism to which they are adapted, produce musical tones, or, in other words, that such rolls are not "copies" of a musical composition within the meaning of the act:

"Musical compositions have been the subject of copyright protection since the statute of February 3, 1831, and laws have been passed including them since that time. When we turn to the consideration of the act it seems evident that Congress has dealt with the tangible thing, a copy of which is required to be filed with the librarian of Congress, and wherever the words are used (copy or copies) they seem to refer to the term in its ordinary sense of indicating reproduction or duplication of the original. Section 4,956 provides that two copies of a book, map, chart, or musical composition, etc., shall be delivered at the office of the librarian of Congress.

"What is meant by a copy?

"Various definitions have been given by the experts called in the case. The one which most commends itself to our judgment is perhaps as clear as can be made, and defines a copy of a musical composition to be a 'written or printed record of it in intelligible notation.' It may be true that in a broad sense a mechanical instrument which reproduces a tune copies it, but this is a strained and artificial meaning. These perforated rolls are parts of a machine which, when duly applied and properly operated in connection with the mechanism to which they are adapted, produce musical tones in harmonious combination. But we cannot think that they are copies within the meaning of the copyright act.

"It may be true that the use of these perforated rolls, in the absence of statutory protection, enables the manufacturers thereof to enjoy the use of musical compositions for which they pay no value. But such considerations properly address themselves to the legislative, and not to the judicial, branch of the government.

The cardinal rule of construction is that statutes should be construed according to the intention of the legislation which passed them. Where the language of an act is clear and explicit, effect must be given to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature. If the meaning of an enactment is not plain, if it is obscure or capable of two constructions, the meaning of what was intended may be ascertained by considering the context and the consequences of either construction. And if it appears that one of these constructions will do injustice, and the other will avoid that injustice, it is the duty of the court to adopt the second, and not to adopt the first; to construe it in such a way as to make it available for carrying out the objects of the legislature, and for doing justice between parties. The grammatical and ordinary sense of the words is to be adhered to, unless that would lead to absurdity or some repugnancy or inconsistency with the rest of the instrument.

In the case of *Curtis v. Stovin* (1889) L. R. 22 Q. B. Div. 513, the court had to deal with § 65 of the county courts act, 1888, which gave power to the high court to send certain actions, which could not be commenced in a county court, "for trial in any county court in which the action might have been commenced." If these words had been construed as they stand, no effect could have been given to the section. The court therefore read into the section the words, "if it had been a county court action." Fry, L. J., in giving judgment, said: "The only alternative construction offered to us would lead to this result,—that the plain intention of the legislature had entirely failed by reason of a slight inexactitude in the language of the section. If we were to adopt this

construction, we should be construing the act in order to defeat its object, rather than with a view to carry its object into effect."

Objections to a Principle.

The chief objections that may be taken to a principle which is set up as applicable to any given case may be summarized as follows:

A. Where the principle relied on is a judicial decision:

1. It has been superseded by legislation,
2. It has been overruled by a higher court,
3. It was wrongly decided and should be overruled,
4. It is in conflict with other decisions of higher authority,
5. It is not applicable to this case, or, in other words, it is distinguishable in principle.

B. Where the principle relied on is a statutory enactment:

1. It has been repealed, either expressly or by implication, by subsequent legislation,
2. It is unconstitutional, or beyond the powers of the legislature to enact,
3. It is in conflict with legislation of a superior legislature having concurrent jurisdiction,
4. It is clear and unambiguous, and the ordinary sense of the words should be adhered to, and in that sense it is not wide enough to cover the present case,
5. It does not express the intention of the legislature having regard to the context and the object of the enactment, and it is capable of another construction more reasonable and consistent with that intention.

C. Where the principle relied on is not a judicial decision or a statutory enactment, but is advanced for the first time:

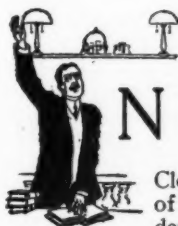
1. It is unjust,
2. It leads to absurd consequences,
3. It is contrary to public policy, that is, to the advantage, convenience, or well-being of the community as a whole.

Samuel Bell

Argument of Questions of Fact

BY CHARLES C. MOORE,

Author of "Moore on Facts."



O genius can dispense with experience," said James Anthony Froude (*History of England*, chap. I.). A few weeks ago some public officials of Cleveland, Ohio, in search of superior fire fighting devices called on Fire Commissioner Johnson, of New York, who sent them to the Fire College then in session, where they listened to a lecture by Deputy Chief Lally on "Fire Fighting in Cold Storage and Oil Plants." The visitors were so impressed that they asked and obtained permission for several Cleveland firemen to attend the college and take the six weeks' course. It is said that some Cincinnati firemen are seeking the same favor. The task of fire fighting is in many respects comparable to a trial lawyer's struggle for victory in the court room. The caprices of the human memory and the manifold fallibilities of other faculties, the foibles of honest witnesses, especially when they are masters of the situation and testify without fear of contradiction ("Human nature constitutes part of the evidence in every case." Per Potter, J., in *Greene v. Harris*, 11 R. I. 5, 17), the ways and wiles of the perjurer and of confederated liars, the situations where a facile conscience may stretch itself like India rubber, the earmarks of truth and of falsehood—the thoroughness of a trial lawyer's knowledge of such matters will determine in the long run the measure of his success in forensic debate of questions of fact.

"No counsel can expect in his own experience to learn more than a small fraction of the possibilities of fallacy and untrustworthiness in the innumerable kinds of evidence," says Professor Wigmore (*Illinois Law Review*). Hence, a

sensible lawyer will avail himself of the experience of judges whose opportunities for observation in the course of long service on the bench are incomparably superior to those of one or of many practising lawyers. Deputy Chief Lally told about the physical "arguments" that he finds to be the most effective in subduing certain classes of fires with which no doubt many or most of his outside auditors had had no personal experience. In like manner, Sir John Romilly's experience on the bench enabled him to instruct lawyers who for the first time are engaged in a pedigree case, that the testimony of perfectly reputable witnesses in such cases as to declarations of deceased persons is often given with the most striking and curious minuteness, and yet is found to be utterly unreliable. *Webb v. Haycock*, 19 Beav. 342, 345. See also his opinion in *Crouch v. Cooper*, 16 Beav. 182, 185. In *Pierce v. Brady*, 23 Beav. 68, 71, he states some of the psychological influences causing that phenomenon, and his explanation thereof constitutes an *argument* from an authoritative source invaluable in resisting the familiar contention that circumstantiality of witnesses strongly attests the fidelity of their memory.

The law reports teem with expositions of general and particular rules for weighing testimony, of the reasons upon which the credit of witnesses ought to rest, and of the inferences of particular facts which may rationally be drawn from certain evidence. Such expositions were *arguments* which led the judge to this or that conclusion on the facts, and it is the common practice for other judges to cite and follow them. From a vast multitude of illustrations a single one must suffice at this place: "Courts of justice lend a very unwilling ear to statements of what dead men had said," declared Mr. Justice Catron, of the United States

Supreme Court.¹ The "Co-ops" citation bureau gives us half a dozen cases where judges have quoted that statement when determining questions of fact.

In the Michigan Law Review for November, 1909, p. 81, a reviewer said: "It seems to the writer more than questionable that courts will permit counsel in argument to take the opinion of another court, and urge the jury, by reason of the declaration of that court, to give a particular measure of credit to one witness as against another, or to give particular weight to any specific fact. Particularly would this seem true in jurisdictions where the court itself is forbidden to give such instructions." The foregoing is from the pen of one who had been a trial judge for a dozen years, and his expression of doubt demands attention. It seems to us, however, that courts would find themselves greatly embarrassed in attempting to enforce an exclusion rule such as he suggests; and before concluding this article we shall let Chief Justice Ruffin speak upon the subject. "Gentlemen of the jury," says counsel in argument, "let me repeat a philosophical observation on this subject made by my grandmother at the breakfast table this morning." In our opinion, none but a very captious judge would sustain an objection; and we believe a judge who habitually exercised that sort of nagging censorship would be reprimanded by a reviewing court. But if counsel had proposed to repeat an abstract deliverance by Lord Bacon, "the Columbus of thought," made in his official capacity as chancellor, a jury must not have the benefit of it! Is that the proposition? In regard to jurisdictions where statutory or constitutional provisions forbid judges to charge on the facts, cases can be found, if our memory serves us, where it has been held that aphoristic utterances by judges are not proscribed by those provisions.

Contending that the memory of his witness, which was at one time a blank as to a particular fact, was afterward credibly revived, counsel quotes as follows from "the little Queen Anne's man," as Byron termed him:

"Lulled in the countless chambers of the brain,
Our thoughts are linked by many a hidden
chain;

Awake but one, and lo, what myriads rise!
Each stamps its image as the other flies."

"From the experience we have in this place, we know," etc., said Sir John Nicholl, alluding to certain frailties of memory and observation.² If the lines from Pope are unobjectionable, may not counsel quote from an opinion of Sir John Nicholl as follows: "How often does it happen that people forget a transaction until some circumstance is brought back to their remembrance, and then the whole facts in connection with it revive in their recollection, and rush back into their memory."³

A witness who overheard a conversation, but did not see the speakers, professes to identify one of them by his voice. Identification by that means implies *ex necessitate* that the witness recognized in that voice something *different* from the voices of other acquaintances. On cross-examination the witness, a man like Moses, "slow of speech and of a slow tongue," is unable to state a single particular which gave the voice individuality. Counsel therefore argues that the testimony is inadmissible, or if admissible, that it is worthless. On the other side John x. 4, is read to the jury: "And when he putteth forth his own sheep, he goeth before them, and the sheep follow him; for *they know his voice*." Motion to strike out John, as it were, upon the contention that it is hearsay testimony, and also because counsel would like an opportunity to prove John mistaken and that the sheep can easily be deceived to follow a simulated voice. Motion overruled. Counsel then proceeds to quote Wells, J., in *Com. v. Williams*, 105 Mass. 62, 67, as follows: "The degree of certainty of identification by that means [the voice] does not depend upon the ability of the witness to describe its peculiarities." Shall Mr. Justice Wells be ruled out?

In a husband's suit for divorce on the ground of adultery, his wife testifies in denial of the charge. It also appears

¹ *Lea v. Polk County Copper Co.* 21 How. 493, 504, 16 L. ed. 203, 207.

² *Reay v. Cowcher*, 2 Hagg. Eccl. Rep. 249.

³ *Wickwick v. Powell*, 4 Hagg. Eccl. Rep. 328, 343.

that the parties had been on bad terms for a considerable period before the alleged infidelity of the wife. Disparaging the value of her testimony, the husband's counsel in argument to the jury reads Proverbs xxx. 20: "Such is the way of an adulterous woman; she eateth and wipeth her mouth, and saith, I have done no wickedness." Will the court stay him in the course of his statement that Vice Chancellor Blake, of the Ontario Court of Chancery, quoted the foregoing verse from Proverbs and said: "A wife who has been accused of unfaithfulness to her husband will, I fear, go almost any length to negative such a charge. The crime is one which at all times the parties are too apt to deny; it has been so, at all events, from the days of Solomon."⁴ If Solomon's expert testimony is deemed available for counsel it would probably be difficult to assign a good reason for excluding Shakespeare's opinion anent the estrangement of the parties: "The fittest time to corrupt a man's wife is when she's fallen out with her husband." (Coriolanus, Act III. sc. 3.)

In a case where a party's witnesses do not remember alike all the minutiae of the matters to which they testify, counsel on the opposite side reminds the jury of the famous case decided by Daniel and reported in the Apocrypha and the Douay Version, where the elders were convicted of conspiracy and perjury solely because of a discrepancy in their testimony on a collateral point artfully exposed by Daniel's procedure in putting them "under the rule." Shall the court exclude Daniel? We will suppose that Daniel passes in. Shall a barrister be put against counsel when he attempts to tell the jury that Daniel's judgment was cited with approval in Dundas Estate, 213 Pa. 628, 642, 63 Atl. 45, 51? May he be permitted to cite the sage Sir John Nicholl to the point that, where a confederacy to commit perjury exists, it will more probably and more decidedly be detected *upon some broad collateral fact*, than upon the transaction itself.⁵ Shall the court, upon request or *suo motu*, put a quietus upon opposing coun-

sel when he starts to read the following from the opinion of Chief Justice Beasley, of New Jersey, justifying himself for accepting the testimony of the witnesses to whom he refers: "To those who know from experience and reflection the laws which regulate the human memory, it does not seem singular that several persons, in speaking of a past transaction, do not each reproduce it in description with the same fulness of detail; but such is not the vulgar notion. Among the ignorant the strongest proof of the truth of testimony derived from several witnesses is the fact that the statement of each is nearly identical with that of the others. Hence, the exact similarity which we so often see in the depositions of corrupt witnesses, whose evidence has been prearranged. But in the testimony of these two persons now before me there are none of the usual marks of collusion. No two narratives concerning the same transaction could be more unlike. It certainly has every appearance of being descriptive of the same occurrence, observed from different standpoints."⁶ As an offset to Chief Justice Beasley, how about the following from the opinion of Judge Tuck in a New Brunswick case, where several witnesses for one party gave different accounts of the same transaction? "It may be argued that this shows there was no concert between the parties as to what they should tell. In my opinion it proves nothing of the kind, for if it were possible to believe that this story was manufactured, it would be equally easy to believe that it was agreed that each witness should vary the account in order to avoid suspicion."⁷

Counsel, arguing that the demeanor of a witness when testifying on the other side was obviously irreconcilable with his testimony, quotes to the jury from Pilgrim's Progress: "When Demas invited Christian and Hopeful to turn aside to the silver mine, 'Is not the place dangerous? Hath it not hindered many in their pilgrimage?' asked Christian. 'Not very dangerous,' replied Demas, 'except to

⁴ Campbell v. Campbell, 22 Grant, Ch. (U. C.) 322, 357.

⁵ Brydges v. King, 1 Hagg. Eccl. Rep. 256.

⁶ Adams v. Adams, 17 N. J. Eq. 324, 335.

⁷ Carney v. Caraquet R. Co. 29 N. B. 425, 436. Not "equally easy to believe," we think, without implicating counsel in that artifice.

those that are careless;' but withal he blushed as he spake." An extract from Lord Chesterfield's letters to his son is then submitted to the jury: "People can say what they will, but they cannot look just as they will; and their looks frequently discover what their words are calculated to conceal."⁸

Do the jury look as if a passage from an imperishable novel and apposite to the discussion will be hospitably received? Well, here is one: "He spoke of apprehension and anxiety, but his countenance expressed real security." (*Pride and Prejudice*, chap. xxxiv, where Darcy proposes to Elizabeth.) From a judicial opinion, counsel obtains the following: "It was indeed pitiful to behold the confusion and shame on the poor fellow's face as he tried to deny or explain his former utterances."⁹

Growing exceeding bold, counsel quotes Deuteronomy xix., verses 16-20, and then proposes to inform the jury that Chief Justice Buskirk, of Indiana, drew the following inference from those verses: "It is quite obvious that the divine lawgiver attached much importance to the appearance and manner of the witness. The conduct of the witness while testifying was evidently regarded as the surest means of determining the truth or falsity of the witness."¹⁰ If the trial judge rules that the chief justice's comments may be quoted, opposing counsel should have the privilege of citing Judge Beck, of Iowa, to the point that the demeanor of a witness should be considered "with great caution," and should have controlling weight "only in cases where other tests fail, or where there are no other means of determining the character of the witness and the truthfulness of his testimony."¹¹

The reports contain innumerable cases where the relative weight of positive and negative testimony is discussed and determined. Counsel for the positive side is allowed, let us assume, to begin his argument to the jury by quoting

from M. Prior's *Epistle to Fleetwood Shepherd*:

"One single positive weighs more,
You know, than negatives a score."

Shall he be restrained from quoting the statement—egregiously and amazingly erroneous, but that is another story—of Judge Thompson, of Pennsylvania: "The witness who testifies positively to the existence of a given fact cannot be mistaken; his testimony must be true or absolutely false."¹² The same absurdity, intensified if possible, appears in a case in the United States Supreme Court.¹³

In a criminal case where an accomplice testified for the government, the court, instructing the jury, remarked that, considering the credit of the witness affected only by the fact that he was *particeps criminis*, there might be found enough probably to justify a good deal of confidence in his statements. He then proceeded as follows: "The jury are, however, to bear in mind that the witness has once before given an entirely opposite account, on oath, of the transaction to which he now testifies, and that in the one instance or the other, he has committed manifest perjury. It may happen that the most depraved of human beings may so bear himself on his examination as to command the confidence of a court and jury; when he unbosoms himself without reserve, and carries to every judgment a deep conviction that he is honestly attempting the only atonement and expiation for his past offenses allowed man in this life,—a confession of his sins, and making all the reparation in his power for the wrongs done by him. Even then the steadier experience of the law admonishes us against yielding to emotion and sympathy, and cautions us that it is safer to abide by well-tried rules of judging than to proceed upon vague impulses, even though the mind may at the moment be entirely satisfied of the truth of the witness, and clear wrong be done in the individual case by not crediting him. The cardinal rule, which has served in all ages, and been applied to all conditions of men, is

⁸ Letter CVIII.

⁹ *The City of Carlisle*, 14 Sawy. 179, 39 Fed. 807, 809, 5 L.R.A. 52.

¹⁰ *Carver v. Louthain*, 38 Ind. 530, 547.

¹¹ *Callanan v. Shaw*, 24 Iowa, 441, 446.

¹² *Frantz v. Lenhart*, 56 Pa. 365, 367.

¹³ *Stitt v. Huidekoper*, 17 Wall. 384, 394, 21 L. ed. 644, 647.

that a witness wilfully falsifying the truth in one particular, when upon oath, ought never to be believed upon the strength of his own testimony, whatever he may assert."¹⁴ Now, let us suppose that one of the accomplices—"Bald Jack" Rose, for instance—who testified against Police Lieutenant Becker in New York city last October, was conclusively proved to have sworn falsely in one part of his testimony, so as to bring him within the incidence of the maxim, *Falsus in uno falsus in omnibus*. Reminding our readers that if counsel for the defendant in a capital case is curtailed by the judge in his liberty of legitimate argument to the jury, particularly as to the credibility of witnesses, an appellate court will surely regard the matter as one for serious consideration, and that a presiding judge in New York state and other jurisdictions where the common-law practice has not been abrogated may, with due caution, indicate to the jury his own opinion on the weight of the evidence, and that he may undoubtedly interrupt counsel in order to tell the jury that they are not bound by what counsel is quoting to them—we invite our readers to scrutinize the following queries and "ring the bell" when they think counsel might safely be halted:

Could Becker's counsel properly insist upon reading to the New York jury the concluding sentence above quoted, as the reported opinion of a judge—not identifying him by name or description? Would he have a right (1) to read the entire quotation; (2) to attribute it to a judge of the United States district court for the southern district of New York, (3) whose penetrating observations on the weight of evidence abound

in the Federal reports, (4) who served for more than forty years on the bench, (5) and from whose decisions it is said that no appeal was taken during the first twenty years; (6) to state that a professional reader of all his reported opinions declares he is entitled to rank, as a sagacious trier of facts, with the greatest judges who have ever sat on a bench in England or America (Moore on facts, § 1074); and lastly (7) to state that the impressive language above quoted was used by him in *charging a jury in New York city*? It may be a species of anticlimax to say so, but Judge Betts's jury brought in a verdict of guilty.

Here is what was said by a magistrate of great distinction, Chief Justice Ruffin (italics ours except the last): "To the jury any argument may be urged impugning or enforcing deductions of one fact from another proved, or from the defect of full proof of either the one fact or the other; and the opinions of men of able and practiced minds may properly be laid before them in argument, as likely to influence their judgment by the force of the reasoning which led to those opinions, or by the authority of the opinions themselves coming from such sources. But it is impossible to say that such a tribunal is bound as to a conclusion of fact, by the precedent set by another tribunal for the decision of facts, whether consisting of a single judge, or of the numerous judges who compose a jury. There is no law to such a body, but its conclusions upon the evidence as to the fact sought."¹⁵

¹⁵ Downey v. Murphey (1834) 18 N. C. (1 Dev. & B. L.) 82, 90.

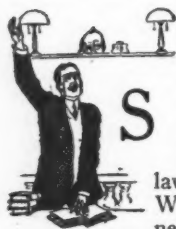
¹⁴ United States v. Osgood, Fed. Cas. No. 15,971a.

Charles E. Moore.



Glimpses of Famous Trial Lawyers

BY RALPH S. NEWCOMER



SUCCESS in the trial of cases can only be won by the most painstaking study, both inside and outside of the court room,—study not alone of the law, but of human nature. We marvel at the greatness of our famous trial lawyers, and well may we do so, but the qualities which made them great were largely the result of assiduous practice and infinite toil. Their achievements were made possible by an uncommon capacity for labor, coupled with an intense desire, for success in their chosen profession.

Rufus Choate did not cease his efforts to attain excellence in every way until his death. He labored incessantly to perfect himself in every detail. He studied to make his every move in court a potent aid to his client's cause. Such was his diligence that he may well have referred to himself when he said "that a lawyer's vacation consists of the period between the question and answer of a witness."

Of William Pinckney it is said: "Pinckney's main qualities seem to have been his power of intense application and his desire for applause. It was his intense application to his law books that made him the most learned man of his time. It was his intense application to the study of the English language, including the classical sources from which so much of our English is drawn, that gave him his copious diction and appropriate use of figures of speech, and made him perhaps the most eloquent man of his age."¹ He tried every case as if his reputation depended upon it.

And some of our eminent lawyers were compelled to exert great effort to overcome their timidity in court. It is related of Chief Justice Taney that at one time he entertained serious intentions of abandoning the law for that reason.²

It may be added that trepidation at the outset seems a wholesome characteristic of a lawyer, since it indicates a fine sensitiveness which is one of the attributes of genius.

Preparation.

It is related of most of our great lawyers, as Horace Binney said of himself, "I never prosecuted a cause that I thought a dishonest one, and I have washed my hands of more than one that I discovered to be such after I had undertaken it, as well as declined many which I perceived to be so when first presented to me."³ An unshaken faith in the righteousness of a client's cause is certainly in itself an incentive to great effort. The espousal of a cause was followed by the most conscientious preparation for the trial thereof. Luther Martin was a notable exception to this rule, and it is said of him that he would frequently dash into the court room after his case had been called, and direct an associate to occupy the time and the attention of the court, while he gleaned the gist of the case from the record.

It is a noticeable fact that many of our great lawyers, in the preparation of causes, not only gleaned from the decisions the principles involved, but tested them by the application of reason. Of David Dudley Field, it is said: "A breaker of precedent rather than respecter of them, Field liked nothing better than to establish sound principle against apparent authority."⁴ And the same may be said of Charles O'Connor, Field's contemporary. The biographers of our country's eminent lawyers emphasize this broad grasp of legal principles as one of the leading characteristics of the men of whom they wrote. To them *ita lex scripta* was a starting point rather than the goal.

Such a course of preparation involves equal familiarity with both sides of a

¹2 American Lawyers, 214.

²4 American Lawyers, 86.

³4 American Lawyers, 236.

⁴5 American Lawyers, 133.

case. It is said of Abraham Lincoln that he knew the strong points of his opponent's case at least as well as did the opposing counsel.

Demeanor.

Dignity both to the court and opposing counsel seems to have been a well-kept precept. Well-timed severity, however, is not inconsistent with the highest dignity. This was exemplified by the conduct of Edward George Ryan, one time chief justice of Wisconsin, who, it is said, was once arguing a matter in the supreme court when Chief Justice Chase, who was presiding, began a whispered conversation with one of his associates. Judge Ryan, observing this, hesitated in his speech and becoming aware of the silence the Chief Justice stopped a moment as if to learn the cause thereof. Judge Ryan then with consummate courtesy said, "Sir, what I am saying is worth hearing." And thereafter as the story goes, the Chief Justice accorded his whole attention to the argument.⁵

Opening Statement.

It was the custom of our earlier lawyers, as now, to make an "opening statement" in the trial of a cause. Much attention should be given to the choice of words, by which the framework of the structure it is proposed to build shall be exposed to the jury. Brevity is desirable. But the statement should set forth the substance of the matter in hand in no uncertain manner.

"As a general rule," wrote Mr. Justice Henry W. Williams, "the proper course in opening your case is to content yourself with a plain, clear, connected narration of the facts and circumstances on which you understand your case to rest, and which you expect to be able to place before the jury. Show them, as you proceed, the connection between the several facts you are about to prove, and the conclusions you ask them to draw from the facts if established.

"Your opening, like everything else you do in the trial of a cause, should be prepared for. You should endeavor to arrange the facts in their natural order,

so that their connection will be easily perceived, and so that the conclusion you wish the jury to draw shall seem natural and logical. There is opportunity for the display of skill in your opening, that you are in danger of underrating. Ordinarily this part of a trial receives very little attention, and it is often turned over at the last moment to someone who is not expected to take any other responsibility in connection with the trial. This ought never to be done."

Examination of Witnesses.

The interrogation of the witness, both in direct and cross-examination, was a task which proved most delightful to many of our great lawyers, among whom there have been many to whom biographers have ascribed a mastery of the art. Anecdotes innumerable have been recounted, which display the subtle methods employed of old in besting the recalcitrant witness, or in impressing upon the court or jury the weight of the testimony given in the direct examination. It may be said of Rufus Choate, of Abraham Lincoln, of Jeremiah Mason, of George Van Ness Lothrop, and many others, that they always maintained a kind and courteous demeanor toward a witness until given good cause to suspect that perhaps

"His tongue took an oath,
But his heart was unsworn."

But, even in dealing with a witness whose honesty was subject to doubt, it was not uncommon to affect a marked courtesy as a means of disarming the witness, and of leading him into a damaging, conflicting statement. Rufus Choate employed this method to a considerable extent. But sterner methods may be employed. In this connection we cannot refrain from mentioning the oft-told anecdote concerning Jeremiah Mason. He had observed, in the course of the examination of a witness, that in answering certain questions the latter lifted his hand to a pocket, apparently involuntarily. In due season Mason advanced upon the witness, and demanded to know in a far from gentle voice, what he had in that pocket. The startled witness produced a

⁵ Green Bag.

piece of paper. On it was set down, in the handwriting of the opposing counsel, the statements to which the witness had testified.

Of Judah P. Benjamin, the author of Benjamin on Sales, who, after becoming famous in the United States as a lawyer and as a Senator, retired to England after passing his fiftieth birthday, and by dint of hard study, became thoroughly versed in the practice of that country and quite successful there in his profession, it is said that "no witness could look into Benjamin's black, piercing eyes and maintain a lie."

That every trial lawyer must anticipate the unexpected in the trial of a cause is patent. In the course of the examination of every witness he treads upon a powder mine, which may explode in the form of an unexpected and damaging answer. But it rests with the examiner to seal up the breach made by the injurious testimony or to widen it irreparably. Abraham Lincoln was able to exhibit absolute composure of countenance upon such an occasion, and he, it is said, would whenever he could consistently do so, merely suggest the immateriality of such evidence and continue the examination.

It is told of Rufus Choate, that on one occasion when a witness gave unexpected testimony, in which he perceived suggestions which might be greatly detrimental to his case, he required the witness to repeat slowly the testimony while with a great display of pains he penned carefully the words uttered. Then he proceeded with the trial. The opposing counsel, at the time of his own argument, was still engaged in such a struggle between his own reason and his sense of Choate's ability that of this important bit of testimony he remarked merely that Mr. Choate had seemed to find something of importance in it to his side of the case, but that it seemed to him to support his own contention.

Conduct in Court.

The manner of most lawyers, on a trial, is characterized by earnestness, which is, of course, markedly partisan. That they are influenced to some extent by the effect of such behavior on the jury

or the court is likely. The average jurymen are summoned suddenly from their work, and the minds of many of them are not given over all of the time to a consideration of the law and the facts. Their interest must be maintained. Some jurors undoubtedly enjoy a tiff between counsel, and they are apt to become biased in favor of one or the other. This makes it quite worth the while of counsel to devote more or less attention to their conduct in court. It furnishes an added weapon in the effort to secure justice for the client.

Taking Notes.

David D. Field, was not given to the taking of notes in the trial. He was possessed of an excellent memory, on which he placed reliance. That each detail of his case remained fresh in his mind for use at an opportune moment is witnessed by his remarkable successes. A similar statement may be made of Judge George Robertson, of Kentucky. He said of himself, "I generally relied altogether on my memory, which, whenever it was my sole reliance, never failed as to any material fact or witness; and thus retaining all that was essential, and unembarrassed by nonessentials, my memory was more vivid, my ideas more consecutive and clear, and my argument more vigorous, concentrated, and impressive."⁶

Style of Argument.

Dignity and earnestness have marked the arguments of our greatest lawyers, whether addressed to the court or jury. Seldom indeed did the circumstances of a case call forth a display of a distorted temper, and none of them descended to frivolity. Lincoln found that the exigencies of a case were met usually by simple, homely illustration, although he resorted to ridicule in some instances. But it should be remembered of ridicule as of the invective, that it is a weapon only in the hands of a perfect master.

Many to-day believe that our great lawyers, especially those of a generation ago, indulged in flowery oratory. As a matter of fact, among the most of our notable advocates grandiloquent argument has been little used. It is not meant

⁶ 4 American Lawyers, 377.

that they employed plain speaking to such an extent as to bore a judge or a jury, for they were quite aware of the need of a pleasing and interesting argument. William Pinckney was, of course, an exception, in that he aspired to be and became the greatest orator of his day. He used majestic figures of speech, and his eloquent appeals were overwhelming in their beauty. He could carry his hearers with him from the crest of one climax to another, thus wholly overriding their convictions. But it must be remembered that there has been but one Pinckney. Neither was he a man to go into a trial unprepared, and had his oratorical ability been measurably less, he would have been accounted a great lawyer. He does not stand condemned by Abraham Lincoln's aphorism: "If anyone, upon his powers of rare speaking, shall claim an exemption from the drudgery of the law, his case is a failure in advance."

The great Theophilus Parsons, of Massachusetts, studiously avoided bombastic argument. He made his appeals in conversational tones, and he chose simple words to express his meaning in a brief speech, which was so delivered as to create the impression that he was taking his hearers into his confidence. Jeremiah Mason made a similar argument. His talks, like those of James Gould, one time chief justice of the supreme court of Connecticut, were un-

adorned, but were forceful and logical statements of facts. Reverdy Johnson was likewise a deliberate and forceful speaker. It is said that even at the climax of his argument, he infrequently even raised his voice, but became rather more serious and thoughtful.

It is not intended to convey herein the idea that forceful or even eloquent arguments rose easily and naturally to the lips of these able advocates. Such was far from true, and in all probability they spent far more time in perfecting their speeches than is customary to-day.

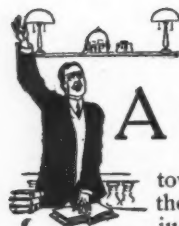
Judge John Catron, of Tennessee, was hampered by a harsh, irritating voice, but this was overcome by his forceful reasoning, which appealed to the understanding of his hearers. Since the days of Demosthenes, oratorical excellence has only been purchased at the price of great labor. Daniel Webster was diligent in the preparation of all of his arguments, and he is said to have once remarked to a friend: "If there be so much weight in my words as you represent, it is because I do not allow myself to speak on any subject until my mind is thoroughly imbued with it." And such has been the practice of those whose names are venerated as the exemplars and sages of the profession.

Ralph Newcomer.

To reach the ideal standard, an orator must be many-sided, and combine within himself every great mental quality—a vigorous understanding and tenacious memory, wit, judgment, imagination, a knowledge of human nature, enthusiasm, self-possession, dramatic power, moral courage, a strong will, and native energy. He should possess, also, certain physical gifts—a clear voice, a sturdy frame. To become a great jury lawyer, many of the characteristics named are essential, especially the power to read human nature—*Hon. William L. Snyder.*

The Lawyer in Court

BY JUDGE J. W. DONOVAN



A TRIAL LAWYER as seen from the bar is not seen from the same point of view as if viewed from the bench. The sympathy of the bar will lean toward the eloquence of the speaker, while the judges, as listeners, are alive to the logic and wisdom of the advocate.

Among the great lawyers which one was fortunate to hear were former President Harrison, Stanley Matthews, and William A. Beach, besides Benton Hanchett, John Van Arman, and Joseph H. Choate, with more than a score of brilliant men like Emory Storrs, Judge George T. Curtis, and Ben Butler.

To itemize a few of the acts of these advocates in the court room may be of interest, as they were each unlike the others in manner and methods. The notes used by General Harrison were a terse paragraph from the statutes defining murder, and the extract he read from the information. He had beautiful diction and polished delivery. I recall one sentence: "I have in my office a picture of the first trial by jury. It is a trial in an orchard; an open coffin holds the victim. The nearest neighbors are the jurors; the relatives are standing in a half circle. The accused is led up near the coffin and told by the trial judge to touch with his finger the open wound of the body in the coffin, to see if it would bleed again."

A hush fell over that court room such as I have never since witnessed,—it was the "Nancy Clem" Case. Conviction followed.

Benton Hanchett had the force of statement that won a million dollar court case. It was this: "He who has the making of a contract, knowing better than all others its purpose and objects, is estopped from ever asking that new conditions be added to it to enlarge its meaning." Opposing counsel sought to

enforce in equity a rental by four railways over nearly a mile of tracks owned by the complainant and reaching the union depot,—a new matter not made known until the depot was established.

A trait of Stanley Matthews was his ingenious and powerful advocacy: First, his brief was wholly concealed in his pocket until he had made parts of it appear as important as the reading of Caesar's will, and then for a half hour he read it and an hour argued it with a matchless delivery and one that won the case.

As to manner in the court room, a more unique and self-possessed speaker than Joseph H. Choate I have never seen. It was a sugar case, and the first effort of his adversary was to gain time. Mr. Choate was as strong and flexible as Damascus steel; he quietly won the point and soon followed it with a model opening. One was pleased with his smoothness and self-control; but when he reached the closing argument,—failure by defendant to furnish a 40,000 cargo of sugar which had suddenly risen in value and forced the buyer to pay a heavy advance in order to supply his customers and which led him to the very brink of failure,—he held the jury as in a vice—firmly—and brushed aside the defense so gracefully that he both pleased and persuaded his hearers.

The last advocate I will mention was a character that one must have seen to describe,—a man then over seventy-two years of age; rather tall, erect, with thin gray hair—not shiny bald—but thinly covered, head high above the ears. In a standing position, he rather leaned backward than forward. He was not an objector to the work of his adversary, but seemed to rely entirely on his own law and evidence; the law portion he recited—did not read it from law books. He was sort of a Webster in his talk to the court and a Rufus Choate in his address to the jury. Once he was annoyed by opposing counsel with "we object" sen-

tences, and the court remarked: "If counsel objects in good faith it is rather frequent, but if for the sake of objecting it should be less frequent." Mr. Beach, half rising, said with splendid effect: "I thank your Honor."

Then opposing counsel opened out louder with, "What we still claim is, your Honor, that there is no evidence of marriage."

Now the reserve power of the tall, gray-haired man is in service. Starting, while yet rising to his feet, he speaks: "Evidence of marriage! Evidence of marriage! what is evidence of marriage, may it please your Honor? Why, living together, may it please your Honor! Introducing each other as man and wife, raising up children together—aye, that going down into the Valley of the Shadow of Death that a woman braves to bear children, may it please your Honor, and for all three they were married. . . .

But when it comes to that other part, when the bloom of beauty fades from the features—O, when it comes to that sacred part, when they should be leading each other down the western hillslope to sleep together in that long repose,—then it is that he seeks to cast her off in poverty and to bastardize her children! Evidence of marriage! What is evidence of marriage?"

You should have seen the gleam of his eye, the thrill of his gestures, the eloquent blend of voice and look and accent; it excelled McCullough in "The Moor," Sothern in "David Garrick," and Barrett in "Richelieu,"—it was like Forest in "King Lear!"

It won a fine verdict.

J. W. Donovan

Bear and Forbear

When'er you see a lawyer wearing harsh forbidding looks,

As to and from the court he daily goes,
Remember, he is thinking of his cases and his books,—
His mind is not enjoying sweet repose.

Don't think he is a wicked man, unsocial and morose,
Possessing naught but selfishness and sin,
If you could know him as he is, he clearly would disclose
A kindly, tender, loving heart within.

Sometimes when he's at leisure and you meet him at his ease

When care and clients' woes are laid aside,
You'll find him as refreshing as a soothing summer breeze,
And that his stony looks, have him belied.

Alike the precious manna, and the heaven's gentle dew,
A dear delightful blessing he will be.
And like an elder brother full of helpfulness for you
Will cheer you with his kindness full and free.

And thus a revelation comes reminding us that when

We meet as man to man, we're much the same,
In human thought and feeling with the common traits of men
And guided by affections sacred flame.

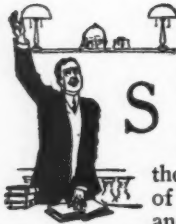
Judge not your toiling brother; and with charity confess,
We're all intensely human and in need,
Of love for one another when the cares of life oppress,
Regardless of our calling or our creed.

Wm D Fetter

"Watchman, What of the Night?"

BY WILLIAM MILNES MALOY, LL.M., J.D.,

Of the Baltimore Bar.



SO engrossing have been the labors of the legal profession in behalf of the shipper, the consumer, and the employee, in their unequal struggle against the practices and abuses of the railroads, trusts, and monopolies, that the leaders of thought in our fraternity have lost sight of the fact that modern social and economic changes have been attended with far-reaching evolutions in the practice of their own profession, and with appalling results to the lawyer of average ability. A brief survey of what has been done during the past decade by independent investigators and by public commissions toward alleviating the cruel results of industrial and financial combinations will disclose the important part of this humanitarian work performed by the American lawyer. In a larger measure than any other class, the lawyer has contributed his time and talents to the study and solution of the problems of maintaining peace between capital and labor, the regulation of monopolies, and the preservation of competition in an age of combination. Amid these momentous changes the status of the bar, almost alone of all classes of society, has escaped consideration. At the Bar Association gatherings the piping voice of some rebellious soul is at times raised in feeble protest, but as quickly squelched, and once in a great while some deep-thinking Teufelsdröckh at one of our universities sounds a cow-horn blast of alarm, but in the main the plight of the lawyer has received scant attention from a society to whose progress the profession has so largely contributed, and in whose civilization it has played such an important role. His status is not alone a matter of individual concern, for indeed there never was an age in which

there was greater need of an independent self-sacrificing class trained in the law, equipped for public service, and fitted to be the spokesmen of their times whenever individual liberty, industrial peace, and the permanency of our institutions may be jeopardized.

The present generation has witnessed combination and centralization in almost every line of human endeavor. We have in this country to-day industrial and financial corporations that represent the greatest aggregations of capital that the world has ever seen. These companies with almost limitless resources and influences are doing title work and conveying, drawing wills, acting as executors and administrators, forming and representing corporations, discharging the duties of receiver and trustee, buying and selling land, and in some of our large cities have in charge almost all the trust estates of the community. It follows that the entering of these corporations into the legal field has had a wonderful effect on a profession in which a short-lived, two-handed, single-brained individual goes forth to cope with this myriad-headed and countless-handed lawyer-created Greifenstein.

Frown down the idea as we may, banish the thought as we will, the ghost of a widely separated and ever more widely separating division of our profession will arise. The bar of to-day is cleft into two *socii* as utterly devoid of like-mindedness, as barren of concerted action, aim, and purpose, as are labor and capital. While recognizing this division in our ranks, it is asserted by some that these differing hosts represent only the healthy segregation of kindred and like-minded souls, which betokens active internal conflict and insured invigorating competition. May it so develop. It is only too true, however, that the separation has occurred, that the line of demarcation is sharp and the difference radical.

The members of one class we find always at the plaintiff's table, and the other ever on the defendant's side. Seldom do they exchange places as did their predecessors in former years, and as they should do in a well-rounded, well-balanced state of the profession. One class we find pleading the poor man's cause in the negligence cases at the bar, and dwelling upon the people's rights on the hustings, while the other we find talking of *ultra vires*, contributory negligence, using such mouth-filling phrases in the court room, and on the stump descanting on settled conditions, vested rights, and the happy condition of the American workman. Be this division in our ranks of benefit to either or both the public and the profession or not, it is true that through the respective spectacles of these two classes the present-day conditions assume a vastly different aspect and hue. Peter Plaintiff, from his side of the table, sees the case differently from his learned brother, and states his case with the vigor of his convictions, while Daniel Defendant, from his side of the table, sees and talks contrariwise. We will endeavor to state the case from the point of view of either counsel.

Big Business and the Bar's Independence.

Peter Plaintiff: Modern business has played havoc with the once vaunted integrity and independence of the lawyer. Big fees have seduced his virtue. He is no longer the venerated mentor, seer, and guide of his clients, but is now the willing tool and abject slave of unprincipled money-mad men. In the discussion of proposed or pending legislation, the great lawyer exerts the influence which his talents and standing give him in behalf of measures against the public welfare, and in favor of the special interests by whom he is secretly retained. The people discover too often, and too late, that it is the voice of Jacob but the hand of Esau. In many instances these talented men have stepped from the defendant's table to the bench. When one such is called to appear before the Great Tribunal, and the bench and bar are gathered together to do him honor, his professional brethren dwell in eulogistic terms on the adamant adherence to prin-

ciple and precedent exhibited by the lamented judge. When the psychological investigator, interpreting history and biography in the light of his merciless science, studying the mental operations of the jurist in arriving at his conclusions in cases dealing with the law of negligence, monopolies, and unfair competition, plunges his scalpel into the mind and soul of his subject, there are laid bare and naked to the world those fixed habits of thought of the judge engendered and developed while in the service of the great corporations, which warped, molded, and controlled the every after judgment of his life. To this product of the day of big business, chained by sublegal influences, distorted by subconscious bias, sitting as a judge of men is committed the God-like duty of passing judgment on the legal rights of his fellows under a system of jurisprudence, in which a legal right exists only as this enslaved and enmeshed judge may decide. My learned brother, look at that long roll of well-thumbed reports on your library shelf. Do you not recall many such cases, and more than one such judge? I repeat that big business has played havoc with the big lawyer, and with a terrible lessening of the public influence of the profession, and of the esteem in which the lawyer as a citizen is held, which decline a no less careful observer and truthful commentator than Ambassador Bryce has regretfully noted.

Daniel Defendant: This is an age of specialization, no less in the legal profession than in every trade, calling, and occupation. The all-around lawyer is a thing of the past, as is the all-around mechanic. The latter day conditions that prevail in the profession have given rise to a class of specializing lawyers, whose skill in effecting vast industrial combinations, and in mapping out commercial campaigns will evoke admiration from lawyers of many generations yet to come. Specialization in the law has not been attended with a narrowing effect on the profession, but, on the contrary, contact with and service for great industrial and financial enterprises have broadened the view of the lawyer and have increased his capacity for big work.

are rich beyond the dreams of the lawyers of any former age in the history of the world. In this struggle for professional success, competition is naturally keen. The very fittest only survive, and those who lag behind fail merely because of their inefficiency.

Domain of the Lawyer Narrowed.

Peter Plaintiff: The field of legal practice has been largely preoccupied by the corporations. Title companies do the research work in the land records, and transact conveyancing through clerks, who mechanically fill out numbered forms. Flaming front-page advertisements inserted by these corporations reprint garbled accounts of reported cases dealing with mistakes made by lawyers and thus solicit and secure business for the company. Law clerks for financial institutions advise customers of the bank on legal matters, draw wills, settle and manage estates. In some large cities trust companies have practically a monopoly of the probate and trust business. What legal business cannot be attended to by the trust company employees is sent to one law firm retained by the company. The industrial combines have a large force of clerks who transact all the legal business, except the actual trial of cases. The best organized companies have their own collection departments or have an arrangement with incorporated collection agencies whose solicitors pay daily visits in the quest of business. To the general practitioner is left trial work only, which in commercial cases is fast disappearing through the establishment of arbitration tribunals and trade credit bureaus, and in negligence cases will be a thing of the past upon the general adoption of workmen's compensation acts.

Daniel Defendant: Big business in the industrial world, it has been demonstrated, means more business. More industrial business means more legal business. You do not hear any complaint of the lack of business from law firms well equipped for the transaction of business. The incompetent lawyer must either work as a clerk for the big law firm or as an employee of a corporation. In no wise does his profession absolve him

from the effects of modern business evolution, which has made of the small tailor, tinker, and shopkeeper, living from hand to mouth and succumbing in the unequal strife, well-paid and happy employees of the industrial combine. Discontent with present conditions is found by that portion of the profession who were wont to prey on the ignorant and credulous. The irksome time-consuming detail part of legal work is now performed by corporation clerks, leaving the lawyer free to devote his time and talents to those matters which really require legal ability, skill, and knowledge.

Conclusion.

No matter from what point we consider the law as a profession to-day, we are forced to admit that there have been far-reaching changes in the past few years. If the lawyer still retains as his peculiar province the field invaded and now possessed by certain corporations, then the contest between the practitioner hampered by his professional rules and the unethical and untrammelled corporation, perforce, must be both unequal and shortlived. There is as urgent need of the study of modern professional conditions, and just as great necessity for a restatement of professional theories, and a readjustment of the code of legal ethics, as there was until recently of a restatement of economic doctrines. If competition be dead or only changed in form, if the field of practice be narrowed or only different in topography, let us know the truth, and adjust ourselves accordingly. Above all, it is our duty to the hundreds of young men preparing for the law at the universities and law schools, to let them know whether or not the profession is any longer a most inviting field of human endeavor, whether or not unaided industry and ability will insure success at the bar, or if, after all, professional advancement through industry and application is now merely a tradition, a myth, a real fiction of the law.

William Andrew Maloy

When the public service needs these men they readily respond to the call, relinquish princely retainers and fees, and give unstintingly of their time and talents to the discharge of public duties. Our bench is adorned by many men who are rendering invaluable service to their age and generation at a salary insignificant in comparison with what they have earned, and could still earn in active practice. A mere glance at the list of those who have served well in the more recent Federal Cabinets, and at the great names in all branches of the public service, will refute the imputation that the lawyer in public office has not been able to rise superior to personal interests and previous connections. On the roll of faithful public servants a grateful people have written higher, larger, and brighter than that of any other class the name of the "Modern Corporation Lawyer."

Influence on Practices.

Peter Plaintiff: Legal ethics are now of interest only to the antiquary and sociologist as a code that once obtained among a class of society known as lawyers. The eminently respectable and highly honorable counsel to the great corporate interests sits in his office, having ears but hearing not, having eyes but seeing not, the disreputable bullragging methods of the claim agents in the employ of his clients. After receiving indirectly the reports from these hirelings, he hurries away to the law school to lecture on ethics. In the secrecy of his library he drafts measures granting valuable special privileges or exemptions to his clients at the expense of the public, conceals these grants in ponderous but innocent-looking verbiage, and then has the bills sent to the lobbyists to be rushed through the legislative readings. The corporate entity is the shield and conscience-salve of many corporation lawyers who in their own private lives observe strictly the rules of honor, but in their professional conduct daily violate every precept of professional probity.

Daniel Defendant: Men who are mentally and morally ill-fitted for the practice of our ancient and honorable profession have come to the bar, and, by pursuing practices tending to lower the

lofty standard of honor maintained for centuries by attorneys, have necessitated prompt and peremptory correction through coercive action of Bar Associations and of the state lawmaking bodies. The contingent fee contract, an innovation savoring strongly of champerty and fraught with serious demoralizing influences, is an offspring of the evil devices of the ambulance-chasing lawyer. It should be frowned down by the elite of the bar. Soliciting litigated cases and advertising to secure divorces without publicity are among the reprehensible methods employed by these lawyers, but there are others which frequently come to the attention of the grievance committees of the bar associations. The popular outcry against the profession is attributable almost entirely to the abuses of those men who struggle to make up for their lack of training, learning, and ability by resorting to unprofessional and dishonorable practices.

Opportunities and Competition.

Peter Plaintiff: The unnatural growth of trusts and monopolies in the business world has killed honest and honorable competition within the profession. Merit will no longer insure success. Nepotism and favoritism control in filling the counselorships to the great corporations. This is true because forensic ability and sound legal knowledge are not so much in demand to-day as a ferret-like talent to find loopholes in tax statutes, and to devise means of evading wholesome regulative laws. Above all a blind subserviency to the dictates of the corporation is essential to continued employment. A present-day Erskine leaping into fame and practice by the brilliant conduct of a single case is an impossibility. Modern business conditions have robbed the practice of law of all semblance of a competitive profession, have closed the doors of opportunity to success by unaided merit, and have left the law poor indeed.

Daniel Defendant: This is the golden age of opportunity for the lawyer. The great corporations are ever on the alert and contend for the services of the man of ability. Merit alone counts with the big business interests. To the successful practitioner the emoluments of to-day

Editorial Comment

"Not where others fail, or do, or leave undone—
the wise should notice what himself has done, or left
undone."



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Edited by Asa W. Russell.

The Ideal Lawyer

IN addresses before Bar Associations and Law Schools, prominent judges and jurists have in the past few months eloquently described the ideal lawyer. We present herewith a brief symposium of noteworthy utterances made by lawyers to lawyers concerning professional character and ethics.

High Ideals

HONORABLE Ira E. Robinson, Associate Justice of the Supreme Court of Appeals of West Virginia, said in an

address before the Bar Association of that state: "No true lawyer is mercenary or selfish. The real minister of the law lives and works for higher and better things than mere monetary income or personal advancement. He lives on a high plane of citizenship. He means that the next generation shall have better ideals and happier lives by reason of his having lived in the present. He is imbued with the worth of his power for good. He chooses the better part, and, as occasion demands, meekly or courageously administers his office in the interest, not of himself, but of truth and right. In this course, he is sustained and sanctified by the religion of his forebears, the memory of an ancestry noble for its uprightness, the traditions and history of his country, the honor of his God-given work, and the wise vision which his very legal spirituality gives him of the eternal fitness of law, order, and the establishment of justice. Thus he worships at the shrine of truth. He realizes above all other men that—

"He's true to God who's true to man;
Wherever wrong is done
To the humblest or the greatest
'Neath the all-beholding sun,
That wrong is also done to us,
And they are slaves most base
Whose love of right is for themselves,
And not for all the race."

"But is it not well to admonish the profession that it cannot maintain this higher usefulness unless its members keep true to its ideals? 'The truth itself is not believed from one who often hath deceived.' Shall those who have a low conception of the profession be allowed to enter its sacred precincts or to remain therein? Oh, the value of a good name, whether it pertain to individual, professional, or national life! What lawyer desires in his local bar the professional company of any man who does not reflect in his life that which is the ideal of the law itself,—truth and righteousness?

A mercenary, a prevaricator, a libertine, a stirrer-up of strife, a traitor to principle, has no regard for the law. Why should he be admitted to its stewardship? How can it be preserved in his hands? Will you give money into the keeping of a thief? Will you have the Constitution supported by one who hesitates not to sacrifice its principles for his own selfish ends? To admit men of this class to the profession is a contradiction of its power and usefulness for good to the citizen and the state. The profession must be a marked embodiment of the honor, truth, and stability of the law itself if it is to maintain the respect heretofore bestowed on it. Only by high ideals and honorable, courageous action at all times can lawyers hope to be the great influential factors in American life that the character of their profession demands that they be. Shall not the bar maintain the best that is in it? Yes, lawyers are men; not for greed or gain, but for God and humanity.

"These words of reminder as to the high calling of the profession, and of admonition as to its province of higher usefulness, seem fitting in these times of commercial rapidity,—these times when extravagance of thought is surely keeping pace with laxity and waste along many lines. It is the laxity of the age in material, physical, intellectual, and spiritual things that has brought to the American people the ills of which they complain. Let us return to the doctrines of the fathers of Virginia, for we are withal Virginians still. That doctrine, written into the Bill of Rights by the inspired Mason, handed down to us in the Constitution of our great state, is a fitting text in this day for every lawyer in his ministry or higher usefulness, a saving political scripture for the guidance and practice of every private and official citizen. Hear the words, underscore them in your book, meditate long on them: *'Free government and the blessings of liberty can be preserved to any people only by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by a frequent recurrence to fundamental principles.'*"

The High Calling of the Lawyer

JUDGE William Z. Davis, spoke as follows concerning the limits of advocacy and the duty of the lawyer to exalt his vocation:

"Although a lawyer may not refuse to espouse the cause of the humblest individual, and under our law in this state is even sworn to never reject, from any consideration personal to himself, the cause of the defenseless or oppressed, he nevertheless has no right to so far put himself in place of his client as to subordinate his obedience to his own conscience of his duty to the court. I have been in the habit, when speaking on occasions of this kind of referring to two very eminent advocates as opposed in theory and practice to my view as already stated. I refer to Lord Brougham and Rufus Choate. A biographer of the latter, speaking of the doctrine that a lawyer should identify himself completely with his client's interests and balk at nothing which would win for him, says:

"Mr. Choate accepted and acted in the doctrine with no qualification whatever; he carried it practically as far as Lord Brougham, and carried it to the extreme verge of honor; yet he was scrupulously careful not to do anything which would be false to his attorney's oath, taken when he entered the bar, to be true to the court as well as the client. He was also true and fair to his opposite counsel; he never, during the period of my observation of him, took any advantage of doubtful character; no mean and treacherous ambuscade, no surprises, no pitfalls masked with reassuring flatteries; he fought hard, but he fought fairly; he conceded to his adversaries nothing that he ought not to concede, but he conceded everything up to that line. As he never got angry, so he never, from pettishness, bore down on an antagonist with unusual severity, or from mere spite tried his cause with gratuitous sharpness and disposition to worry; and he never pettified; but he took every just and proper advantage; he never yielded an inch of real standing ground; he never gave up; he fought his cause through every court into which it could be carried or driven; and he went for victory to the

last beat of the pulse and the last roll of the drum."

"This is an attractive picture of the great gladiator of the New England bar; but it is a dangerous example when followed by a man with less intelligence, with less self-control, with less love of justice, and with less sensitiveness to honor than was possessed by the gifted advocate, who was one of the brightest ornaments that ever adorned the American bar. A man of common mold, and most of us are of that description, is in danger of allowing the love of victory, or the love of a big contingent fee, or the dislike of the opposing counsel or his client, to carry him beyond the point of strict right and of knightly courtesy. These motives, and such as these, severely test the character and temper of a lawyer. If he is not strong he will not resist them. And such sifting every man at the bar must daily undergo in the presence of the court. The tendency is to exasperate him and throw him out of balance in the constant antagonisms and contradictions, the unjust imputations, the frequent surprises and disappointments, and the exhibitions of the meannesses, and the worst and most disgusting side of human nature. And greed, or the desire of humbling a rival, or it may be the mere exhilaration of success, may tempt one to do an unmanly and dishonorable thing, and worst of all, his moral sense may be so narcotized that he may be altogether unconscious of the wrong.

"Now I insist that no lawyer has the right to knowingly aid in working an injustice; and no client has the right to demand of his counsel that he will sacrifice his own honor in fidelity to him. I maintain that it is the duty of the lawyer to exalt his vocation so that, without requiring insincerity, abuse or dishonor in him, it may fulfil its true purpose and promote the ends of justice. And in the pursuit of this high calling the lawyer should temper his zeal for his client with such generous courtesy to courts and juries, to parties, witnesses, and opposing counsel, as the circumstances will permit. He will have need for all of the discretion that he can command; and he will be sure to fail sometimes—it may be when there was least reason to lose self-

command. But then failures will bring added strength and caution, and with high purpose and stern resolve every such experience tends to that consummation of character which makes a man truly great; for 'he that ruleth his spirit is better than he that taketh a city.'"

The Duty of the Bench

THAT the bench has a duty to perform in assisting the bar to be what it should be, ethically speaking, was forcibly urged by Mr. John Bryce Baskin in his address as president of the Kentucky Bar Association, as follows: "Who in reality fixes the standard of right for the lawyers? I answer, the bench. From the bench the bar should receive its ideals and its inspiration. It is not enough that the judges are themselves upright. In guarding their own integrity, they perform only a part of what is expected of them. The bar is in fact what the judges make it; or perhaps it would be more correct to say that the lawyers are what the judges require them to be or permit them to be. You, gentlemen of the ermine, can fix the rules of conduct up to which we of the bar must measure, and you have the power to enforce your requirements. Our professional lives are in your hands. Let the judges make it plain that they will not tolerate any attempts on the part of attorneys to deceive the courts or the juries, or to travel out of the record, or to volunteer to the jury statements which are not under oath, of their belief in the justice of their clients' causes, or to deliberately cite overruled cases, or to misappropriate a client's money,—in short, let the judges enforce the recognized rules of ethics, and punish by reprimands, fines, imprisonments, and even disbarments, in extreme cases, all violations of those rules, and very soon we would see the whole tone of the bar elevated.

"Suppose counsel should make to the jury statements not warranted by the testimony, or be guilty of other improper acts, do you think it sufficient for the judge to stop him and tell the jury to disregard his statements or acts? Having heard the statements or seen the acts, it is almost impossible that all the mem-

bers of the jury should forget them, and many times some of the jury will be influenced by those statements or acts, notwithstanding the admonition to disregard them. In such a case an injustice is committed, and the judge sits by and witnesses the wrong. If the court would fine the lawyer thus offending and immediately discharge the jury, can anyone doubt that the better class of the community would applaud the judge, while the shyster would never repeat his offense,—certainly not before that judge. A verdict not fairly obtained ought never to be returned. In fact, when the unfairness occurs, there should be no verdict, but the trial should be stopped then and there. What lawyer would dare, in the Supreme Court of the United States, to intentionally cite an overruled case, or to misstate a statute, or to misrepresent facts in the record, or even to suppress by his silence anything important whether of fact or precedent? There is no reason why our courts should not be similarly exacting. . . . Some of our courts are strict in their requirements of the lawyers in regard to the observance of the rules of ethics, while others are not so strict. I submit to every judge in Kentucky that none are too strict and few are strict enough."

The Quest for Justice

THE responsibility of the bar for the attainment of justice was splendidly presented by Mr. Joseph C. France, of the Baltimore bar, at the last meeting of the American Bar Association. He said: "The fact remains that our profession has never assumed any responsibility for justice as distinguished from victory. 'Tell the truth if necessary to win the case,' is a scurrilous jibe, but not altogether pointless. We do not, as a profession, put justice in the first place. Until a comparatively recent time, the apostle of legal ethics has been as the voice of one crying in the wilderness; and even to-day that subject has something of an apologetic aspect. We teach that the lawyer should not champion an unjust cause, but we commonly hedge by saying that after all the

jury is the judge of the facts, and the court, of the law. We emphasize the duty of unswerving fidelity, and forget that serving the client is not always a lawyer's highest duty. The question is not so much one of legal ethics, as of professional viewpoint; and it seems to me we are bound to agree with those who say that the common-law conception has survived its usefulness; that the argument based on advocacy is overweighted, and that the Justinian standard should be the ideal, not alone of the judge, but also of the lawyer. Nor is such a standard Utopian. In the first place, it does not mean that we must necessarily decline a case in which legal rights will produce harsh results. But it does mean an honest effort to mitigate such results; and the refusal, in an unconscientious case, to shift the responsibility on to the judge or the jury. The preacher would say that the lawyer, especially, has his soul to keep. In the second place, the suggested standard does not limit the legitimate scope of advocacy nor the honorable zeal of the advocate. It assumes the lawyer's duty to present the cause of his client, once he has undertaken it, in the best light, and to use therein all the technical skill and all the fair advantages that the rules of the game permit. But it does not allow him to distort the facts, to befuddle the court, or to play the part of an ancient hired champion or that of a modern expert witness.

"Here some practical person may ask the familiar question: Do we practice law for the glory of God? I answer, What's the harm? Is it true that the standard suggested will interfere with professional success? Philip Yorke, afterward Lord Hardwicke, chief justice of the King's Bench and Lord Chancellor, was a great lawyer and a great judge; and by his own merit and force of intellect he won and proved worthy of the legal prizes of his day. By some biographer, whom I cannot now cite, he is quoted as saying, in effect, that an advocate's surest way to success lies in making a fair and frank statement of the opponent's case; and in addressing the jury 'with the veracity of a sworn witness and with the impartiality of a

judge.' High ground, that; but certainly worth the taking, and not difficult of access,—once the standard of the profession is planted there."

Juror Judges

ATTORNEY General John S. Dawson, of Kansas, is reported to be in favor of professional jury service. He is said to favor the enactment of a law providing for the appointment of jurors for life from men with some knowledge of the law, who would be paid regular annual salaries, and would be required to travel the circuit with the judge, fifteen jurors to sit in each case, the concurrence of twelve being required to a verdict.

The "professional juror" has never been a favorite in legal circles. "Effective measures for judicial reform of the jury system," aptly remarks the St. Louis Post Despatch, "invariably contemplate his elimination. Most codes provide that a man may be eligible to jury duty only once in periods of considerable length."

"Jurors so appointed would be virtually judges. If continental Europe's system of trying men before several judges sitting *en banc* without a jury of laymen is to be introduced, why prescribe the absurd number of 15 judges? What seems to be a similar system of juror judges in some parts of Russia has greatly simplified the problem of getting courts that may be depended on to convict, whether the charge is felony or a mere political offense.

"The old Anglo-Saxon jury system, with safeguards against abuses, is hard to improve."

Law, Logic, and Precedent

IF all the law books in the country were burned in a single night, we would have better laws in ten years than we have now."

This statement was made the other day by Judge William L. Kelly, of the Ramsey county district court, at St. Paul. The learned jurist referred to the growing tendency of attorneys to argue cases by citing authorities and precedents, and

asking judges to decide cases, not on logic or the law, but on previous interpretations of the law, which, as everyone knows, are often conflicting.

Judge Frederick N. Dickson, of the same court, indorsed Judge Kelly's view, and added:

"If attorneys based their arguments more upon an innate sense of natural justice, common sense, and fair play, instead of fortifying themselves with decisions of other courts, I believe we would get better results. The multiplication of law books and legal reports in modern law practice has caused lawyers to rely too much upon precedent, and not enough on common sense. In the pioneer days lawyers had fewer law books. Consequently they based their arguments on fair play, instead of fortifying themselves with decisions of other courts."

There is, however, another side to this question, which was well brought out by Mr. Norman T. Mason in his address as president of the South Dakota Bar Association. Said Mr. Mason: "While the increase in the volume, as well as the volumes, of the law, tends to decrease the lawyer's reliance upon his own knowledge of legal principles, by increasing his dependence upon authorities, I believe that for the public at large it is a good thing. Undoubtedly, the public gets better advice from the average lawyer—advice which is less likely to be vitiated by some unthought of exception or modifying principle—by reason of this very multiplication of authorities. In these days no careful lawyer, be he never so learned or unlearned in the general principles of the law, will give advice on a specified state of facts which presents any doubtful phases, without making at least a slight effort to ascertain what the adjudged cases say; and a very slight research is ordinarily sufficient to find a case in point that has been determined by one who is generally better than an average lawyer, upon more or less of deliberation, and with the assistance of counsel presenting each side of the controversy. Good tools in the hands of a poor workman are often more efficient than poor tools in the hands of a fairly skilled mechanic.

Correspondence

"Parturiens Mons, Nascitur Ridiculus Mus."

Editor of CASE AND COMMENT:

At last, after years of brooding and travail of soul, the famous "Frenzied Financier" of Boston has given to our anxiously expectant world his much vaunted and widely advertised "Remedy" for stock gambling. But the "Remedy" which he now puts forth is ridiculously inadequate as well as absurd and impractical. He proposes to amend the national law prohibiting the use of the United States mails for advertising or conducting lotteries, etc., by including therein all written or printed matter "concerning any stock exchange where securities or stocks, bonds, notes, or other evidences of indebtedness, or evidence of part or proportionate ownership of property, are dealt in on a margin or on credit, unless said stock exchange is incorporated by the Congress of the United States."

In other words, while pointing out the manifold evils of dealing in stocks on a margin, "short sales," and other devices for gambling, quite as reprehensible as lotteries, such transactions are to be permitted by law, according to this wonderful piece of legislation, provided "said stock exchange is incorporated by the Congress of the United States."

How can gambling in stocks be considered immoral and detrimental to the community when practiced on the floor of the present New York Stock Exchange, and become moral and beneficial as soon as the Exchange obtains a Federal certificate of incorporation?

Now the true remedy lies not in the passage of additional laws, but in the enforcement of those now on the statute books. The root of the entire evil is the partnership between the banks and the brokers who conduct their gambling operations in Wall street, not only on the Stock Exchange, but also on the Consolidated Exchange, and even on "The Curb." Dissolve this partnership, whereby the banks, in violation of law, use the money of their depositors in speculative ventures, over-certify the checks of their broker customers, carry "borrowed" stocks, and otherwise participate in this gambling game, by prosecuting, convicting, and sending to jail a few more "bankers and brokers," and that would put an end to all this nefarious business.

Only one additional step is necessary, namely, to repeal the present law which permits banks to charge usurious rates of interest on "call loans," and thus acts as an incentive to "corners," "pools," and panics.

All this was clearly set forth by me in an article which I contributed to Moody's Magazine for May, 1909, entitled "How to Stop Gambling; The Legal Remedy."

The views thus expressed by me more than three years ago have found confirmation to a large extent in the notable opinion just handed down by the United States circuit court of appeals, in the two cases of Ernst et al., plaintiffs, against The Mechanics' and Metals National Bank of the City of New York, defendant; and Hotchkiss, as Trustee in Bankruptcy, et al., plaintiffs, against The National City Bank of New York, defendant, wherein all the judges concurred.

In the course of this opinion, whereby it was decided that the banks had no such equitable lien as they claimed upon the stocks deposited with them by the brokerage houses, the following significant language is used: "In this case the banks seek to escape by claiming that they had an equitable lien upon the securities subsequently delivered and cash deposited by the brokers, and that they were receiving only their own property. Each of them, however, admits that it made the day loan under the written agreements above mentioned. Each contained provisions as to securities in the possession, but none as to securities not in the possession, of the bank. Those in question here were not in the possession of the banks. Moreover, neither the banks nor the brokers when the transfers were made spoke of securities specifically covered by their loans. The banks simply demanded security generally, and took whatever they could get. The conduct of the parties at the time is inconsistent with any claims to specific securities or their proceeds. We see no ground for claiming an equitable lien under these contracts alone."

The opinion of the court also recites an extraordinary stipulation entered into between the banks and brokers, in anticipation of legal proceedings or trial of suit brought to recover said securities, as follows: "It is further stipulated that if the members of the stock exchange houses to which the said banks made the so-called day or clearance loan were called as witnesses herein, each of the said brokers called would testify respectively that the amount of the so-called day or clearance loans was credited to his general account with the bank; that in this general account there was also credited the balance he had on deposit with the bank at the opening day. That all of the moneys received by him in the course of his business throughout the day, from whatever source, was deposited with the bank making the so-called day or clearance loan, and credited to his general account as aforesaid. That in the course of the day he drew and had certified checks against the said account which were used to pay off demand or time loans, and obtained the release to securities held as collateral thereto, or to take up stocks, bonds, or other securities, which he

had agreed to purchase, or to borrow stock for delivery, or for the substitution of securities, but it was accepted and understood that no portion of the proceeds of the day or clearance loan was used for any purpose other than to clear securities, although the broker is at liberty to draw against the balance standing to the credit of his account in excess of that derived from said day or clearance loan to pay the general expenses of his business and to meet the general obligations thereof."

The court, in commenting upon the above, does not go so far as to say that this was a stipulation whereby the broker agreed to testify falsely for the protection of the bank, but it does say, in effect, that it was not in accordance with the facts as proved.

"We do not think that the usage alleged was proved. It was abundantly established that the brokers do repay banks for the clearance loan on the same day and generally with the proceeds of the released securities or of substituted securities, and that it is understood or accepted that this shall be done. This, however, only shows the way in which the business is done. It could hardly be done, and certainly could not be continued, in any other way. Such a course does not establish that the brokers have agreed to do these things, or are bound by the usage to do that, or that the banks are entitled to the proceeds of the released securities. Indeed, we understand that the questions as to the rights and obligations of the parties, if the broker fails to repay or secure the clearance loan on the day it was made was raised for the first time in the case under consideration."

In view of this clear exposition of the law, and the admissions wrung from reluctant witnesses before the investigating committee at Washington, the way is prepared for prosecuting officials, both state and national, to destroy gambling in stocks by crushing the criminal conspiracy between the banks and brokers. Now is the time and the opportunity. Money for investment will then seek the legitimate channels of trade and commerce, lawful enterprise will be promoted, mortgage loans will be made more freely on real estate, the title to which has been vested by the state under the Torrens land title registration law, all honest business will prosper, and the public will be relieved from this terrible incubus of "get rich quick" gambling mania, which now paralyzes every industry.

GILBERT RAY HAWES.

New York City.

"Judge-Made Law."

Editor CASE AND COMMENT:

In this day of criticism and abuse of courts and the cry, both from laymen and members of the profession, of "judge-made law," would it not be well for us all to stop and consider, and learn if we can just what law really is, and always must be?

I submit that as a general proposition, the law, whether common, civil, statutory, con-

stitutional, or judicial decision, is but the human approximation of the absolute right and wrong, considered in their relations with each other, their relations to things in general and to the individual and the state. The law is the human understanding of these abstract principles of right and wrong, and can never be absolutely just in all cases until courts and lawmakers have possessed themselves of all the attributes of Deity.

While the abstract principles of right and wrong have always existed, the natural and Divine laws have revealed to us many and perhaps all of these principles, yet, it is only in this sense that laws are or ever can be certain. The common law properly understood, construed so as to carry out these principles, is as good as any law and sufficient to meet all cases. The conception of the lawyer and judge as to the origin and extent of this law has been its only weakness and defect.

The point that I am leading to is this: That law generally speaking is not exact. That there is in practice no other law than "judge-made law," and this is true whether considering the common, statutory, or constitutional law,—in fact considering any law. The reason is this, the common law, statute law, and Constitution are only general principles, what might be called examples or illustrations of the law. They are general, but must be applied to specific cases. While the lawyer will tell you that "every case must stand upon its own bottom," he, and the public generally, have considered that the statutes and Constitutions are something altogether different from the common law, and, by being reduced to writing, places their construction and application in a different category from that of the common law; whereas in fact, there is little, if any difference, when it comes to be applied to specific cases.

With the common law, there is no question ever raised that courts must deduce the law from general principles as applicable to the facts in any given case. This is just as true of the statutes or Constitutions. The statutes and Constitutions are but general principles to be applied to specific cases, where the facts in each case differ from those in every other. The court must determine whether the facts in a given case bring it within the general principle, and whether the statute or Constitution was intended to apply to the facts in a given case. So, the judges in all cases declare the law applicable to the facts, and there is nothing but general principles, until the court does declare the law in each case. It follows that the law is always uncertain, and there is no law applicable to a specific case until the court has in fact declared it, first deducing it from the general principles. Then it must be that all decisions, are "judge-made law," and that there can be no other law in a specific case than "judge-made law." To sneer at "judge-made law" is but sneering at human limitations and human reason.

G. WILLARD JOHNSON.

Old Town, Me.



Among the New Decisions

Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially.—Socrates.

Accord — acceptance of principal — waiver of interest. The old common-law rule that payment by a debtor, and receipt by the creditor, of a less sum than is due upon an undisputed liquidated demand, is not satisfaction of the debt, although the creditor agrees to accept it as such, is held in the West Virginia case of *Bennett v. Federal Coal & Coke Co.* 74 S. E. 418, annotated in 40 L.R.A. (N.S.) 588, to be inapplicable to a balance claimed for interest due by way of damages on an implied agreement to pay interest.

Bills and notes — purchase — bona fides — prior suits. The fact that a bank which has purchased notes from a horse dealer has had more than twenty suits to collect the notes, the defenses usually being that the horses were not satisfactory, is held in the South Carolina case of *Citizens' Trust & Sav. Bank v. Stackhouse*, 74 S. E. 977, 40 L.R.A. (N.S.) 454, not sufficient to defeat the bona fides of its purchase of another note, so as to let in the defense of fraud in favor of the maker.

The general question as to the circumstances sufficient to put a purchaser of negotiable paper on inquiry is treated in a note in 29 L.R.A. (N.S.) 351.

Breach of peace — bond — forfeiture — shooting dog. That a conviction and fine for being disorderly, shooting a dog in a street, and insulting a citizen, does

not forfeit a peace bond under statutory provisions that such bond shall be required upon apprehension that the obligor will commit violence endangering human life, or a felony, or an offense against the person or property of another, and will be forfeited by conviction of a felony or an offense constituting a breach of the peace, is held in the Kentucky case of *Ball v. Com.* 147 S. W. 953, annotated in 40 L.R.A. (N.S.) 186, where the cases on what conduct will work a forfeiture of a peace bond are gathered.

Criminal law — injunction against enforcement of statute — effect. The existence of a preliminary order enjoining the enforcement of a statute relating to the inspection of oil pending a suit to test the constitutionality of the statute is held in the Wisconsin case of *State v. Wadhams Oil Co.* 134 N. W. 1121, 40 L.R.A. (N.S.) 607, not to relieve one who makes sales in violation of the terms of the statute from prosecution thereunder, if the statute is ultimately held to be valid.

This seems to be a case of first impression upon the question as to criminal responsibility for violation of a statute pending an injunction against the enforcement thereof.

Divorce — habitual drunkenness — definition. To come within the operation of a statute allowing a divorce for habitual

drunkenness, it is held in the Arkansas case of *O'Kane v. O'Kane*, 147 S. W. 73, that one need not be constantly drunk or incapacitated from transacting his business; it being sufficient if he has the fixed habit of frequently and repeatedly getting drunk when opportunity offers, or has lost the will power to resist temptation in that respect.

The recent authorities as to who is an habitual drunkard, within the meaning of the divorce laws accompany this decision in 40 L.R.A.(N.S.) 655, the earlier adjudications having been collected in notes in 34 L.R.A. 449, and 6 L.R.A.(N.S.) 914.

Food — liability for unfitness. The keeper of a public place where food is served is held bound in *Doyle v. Fuerst*, 129 La. 838, 56 So. 906, annotated in 40 L.R.A.(N.S.) 480, to know that the articles sold are fresh and fit for human consumption, and is liable in damages for injury due to their vitiated and deleterious character.

Highway — additional servitude — electric railway. The mere fact that an electric railway is constructed in a public street with T-rails, and that its cars are operated by the use of wires and poles, is held in *Cadwell v. Connecticut Co.* 85 Conn. 401, 83 Atl. 215, not to show that it is an additional servitude on the highway. Recent decisions on this subject are appended to the report of the case in 40 L.R.A.(N.S.) 253, the earlier adjudications having been gathered in a note in 4 L.R.A.(N.S.) 202.

Husband and wife — sale of morphine to husband — liability to wife. One who with knowledge that a husband, by the constant and continued use of morphine, has become so weakened in body and mind that he is unable to resist his cravings for the drug, and who, after the repeated protests of the wife, continues to sell morphine to the husband until by the use thereof his mind becomes so impaired and destroyed that it is necessary to confine him in an insane asylum, is held in *Flandermeyer v. Cooper*, 85 Ohio St. 327, 98 N. E. 102, annotated in 40 L.R.A.(N.S.) 360, to be liable to the

wife for damages for her loss of consortium.

Insurance — accident — voluntary exposure — drowning from canoe. That one who, while on a pleasure trip in a canoe, continues on his journey on a lake in a high wind when persons familiar with the location warn him of the danger, and no other canoes are out, voluntarily exposes himself to unnecessary danger, and is negligent, so that in case he is drowned by the overturning of the canoe, no recovery can be had on an accident insurance policy which exempts the insurer from liability in case of death from such exposure, is held in *Morse v. Commercial Travelers' Eastern Acci. Asso.* 212 Mass. 140, 98 N. E. 599, which is accompanied in 40 L.R.A.(N.S.) 135, by the recent decisions on voluntary exposure to unnecessary danger, the earlier cases having been gathered in notes in 40 L.R.A. 432, 22 L.R.A.(N.S.) 779, and 27 L.R.A.(N.S.) 1164.

Insurance — forfeiture — reinstatement — control of discretion. That the courts will not control the discretion of the officers of an insurance association in refusing to reinstate a member who has forfeited his rights by nonpayment of dues, where the contract provides that any person in such circumstances may be reinstated "in the discretion of the officers," "upon his furnishing them satisfactory evidence that he is in good health;" at least, where there are facts bearing upon the question of his health which might influence the sound judgment and good conscience of an officer to decide against reinstatement, is held in *Conway v. Minnesota Mut. L. Ins. Co.* 62 Wash. 49, 112 Pac. 1106, annotated in 40 L.R.A.(N.S.) 148.

Insurance — vacancy of building — sleeping quarters. A building leased to a woman for a boarding house is held in the South Dakota case of *Seubert v. Fidelity-Phenix Ins. Co.* 136 N. W. 103, not to become vacant and unoccupied within the meaning of a clause in an insurance policy rendering it void under such circumstances, if, after the tenant has removed the most of her furniture

to another building, her husband and his man continue to occupy the building nights, looking after his stock, which remains on the premises.

The cases discussing the effect of sleeping on premises to prevent their becoming vacant or unoccupied within the meaning of an insurance policy are gathered in the note which accompanies the foregoing decision in 40 L.R.A.(N.S.) 58.

Intoxicating liquor — determining age of minor — inspection by jury. That the jury cannot determine the age of the purchaser by inspection only in a prosecution for illegally selling liquor to a minor, where at no time during the introduction of the evidence was its attention called to the fact that the prosecuting witness was on inspection for that purpose, is held in *Quinn v. People*, 51 Colo. 350, 117 Pac. 996, annotated in 40 L.R.A.(N.S.) 470.

There is considerable diversity of conclusions among the authorities which have passed upon the right of a jury in a criminal case to determine one's age by inspection or observation. An examination of the various cases reveals holdings that the jury cannot weigh one's age by inspection or observation where attention has not been called to the fact that such person was on inspection for that purpose; holdings that under no circumstances can the jury take one's appearance into consideration, the ground being that such evidence cannot be preserved for review; holdings that the jury may consider personal appearance in connection with other evidence as to age; and holdings that the jury may determine age by inspection and observation even though there is no other evidence on the subject. The majority of the cases are to the effect that the jury may take personal appearance into consideration in determining age, especially where there is conflicting evidence upon the issue, but it may be of interest to note that every case, down to *Quinn v. People*, in which the report shows that the contention was made that the jury could not determine age by inspection or observation, for the reason that such evidence could not be preserved for review, the court has so

held, placing the decision upon that ground.

Kidnapping — possession by parent — liability. That neither a father nor his assistant is guilty of kidnapping where they obtain by misrepresentation peaceable possession of his child from its mother, who has begun divorce proceedings against the father, but no order has been made affecting the custody of the child, is held in the Iowa case of *State v. Dewey*, 136 N. W. 533, 40 L.R.A.(N.S.) 478.

The question whether the taking of a child by or at the instance of one parent, from the custody of the other parent, constitutes kidnapping, was considered in a note in 32 L.R.A.(N.S.) 845.

Landlord and tenant — negotiation for renewal — holding over. Where landlord and tenant are negotiating for a new lease for farm land at the time of the expiration of the original lease, and the tenant remains in possession pending the negotiations, with the express or tacit consent of the landlord, the landlord is held in the Oklahoma case of *Turner v. Wilcox*, 121 Pac. 658, to be estopped from treating the tenant as holding over for another term under the condition prescribed in the original lease, but the tenant becomes a tenant from year to year.

The authorities on the effect of holding over pending unsuccessful negotiations for a new lease are gathered in the note which accompanies the foregoing decision in 40 L.R.A.(N.S.) 498.

Libel — charging extortion. That it is libelous *per se* to charge that one having the exclusive agency to secure talent for a particular opera house exacts exorbitant amounts from artists to secure contracts for them, since it tends to prejudice him in his business, is held in *Astruc v. Star Co.* 113 C. C. A. 499, 193 Fed. 631, which is accompanied in 40 L.R.A.(N.S.) 79, by a note discussing the question whether charging one with exacting excessive compensation for goods or services is libelous or slanderous.

License — grant — right to hunt — interference — liability. One who has

granted the exclusive right to shoot wild fowl upon the waters upon his land is held in the Oregon case of *Isherwood v. Salene*, 123 Pac. 49, not liable in damages for clearing and draining the land, if he does so in good faith for the purpose of improving it, but may be so if he acts in bad faith in order to injure the grantee.

The nature and extent of the right created by a private grant of a hunting or fishing privilege is the subject of the note which accompanies this case in 40 L.R.A. (N.S.) 299.

License — nonresident merchant — agent — uniformity. That a municipal corporation cannot be authorized to exact a license tax from agents seeking orders for merchants located in other towns and states, which is not imposed upon the agents of local merchants, under a Constitution which authorizes the taxing of trades, but which has been held to require them to be taxed uniformly, is held in *State v. Williams*, 158 N. C. 610, 73 S. E. 1000, which is accompanied in 40 L.R.A. (N.S.) 279, by a note in which the decisions treating of discrimination against nonresidents, by statute or municipal ordinance imposing a license or occupation tax, are discussed.

Marriage — engagement — ill health — postponement — effect. One who, having engaged to marry a woman, postpones the ceremony because of her ill health, is held in *Travis v. Schnebly*, 68 Wash. 1, 122 Pac. 316, to undertake to wait a reasonable time for her recovery. But a man is released from his promise of marriage if the other party to the contract becomes ill without fault of either party, after the promise is made, and fails to recover her health within a reasonable time thereafter.

The recent authorities on the subject of ill health as a defense to an action for breach of promise to marry are gathered in the note appended to the foregoing decision in 40 L.R.A. (N.S.) 585, the earlier cases having been presented in a note in 7 L.R.A. (N.S.) 582.

Master and servant — chauffeur — negligent operation of leased car — liability.

A chauffeur sent by the owner of a garage to operate an automobile leased for a pleasure ride, and who obeys the directions of the lessee merely as to routes, is held in the Wisconsin case of *Gerretson v. Rambler Garage Co.* 136 N. W. 186, to be the servant of the owner of the garage, and the latter will be liable for injury inflicted upon occupants of the car through his negligence.

The note which accompanies this decision in 40 L.R.A. (N.S.) 457, treats of the responsibility for negligence of a chauffeur operating a leased or demonstrating car.

Militia — articles of war — binding effect. It is clear that state militias are not subject to the Articles of War of the United States in times of peace, unless such Articles have been adopted or promulgated by the state as a part of the state regulations. This was the rule adhered to in the North Dakota case of *State ex rel. Poole v. Peake*, 135 N. W. 197, and is in conformity with the earlier authorities as disclosed by the note accompanying this decision in 40 L.R.A. (N.S.) 354.

Mortgage — foreclosure sale — insisting on cash — effect. An unusual question was considered in *Lipsohn v. Goldstein*, 212 Mass. 144, 98 N. E. 703, annotated in 40 L.R.A. (N.S.) 627, holding that a sale under a power in a mortgage will not be set aside because the mortgagee insisted on cash and furnished the money to the buyer to comply with his bid, if he acted in good faith, the bid was reasonable, and the mortgagee did nothing to prevent the mortgagor from raising the money or bidding at the sale.

Moving picture operator — license — validity — discrimination — delegation of power. Requiring one to secure a license after examination before operating a moving-picture machine in a large city is held in the Maryland case of *State ex rel. Ebert v. Loden*, 83 Atl. 564, not to deprive him of his liberty or property without due process of law. Nor is a statute requiring any person desiring to engage in the business of moving-picture machine operator to secure a license

rendered discriminatory and invalid because it gives those engaged in the business at the passage of the statute sixty days in which to secure their licenses, and the legislature may delegate to a board power to license moving-picture machine operators, and provide for the revocation of their licenses.

The foregoing decision is accompanied in 40 L.R.A.(N.S.) 193, by a note treating of regulation as affecting moving pictures.

Municipal corporation — power to declare nuisance — hospital. That municipal authorities may declare an existing hospital within its limits for the treatment of insanity or other mental diseases to be a public nuisance, unless property owners situated within 200 feet of the buildings consent to its location and maintenance, is held in *Shepard v. Seattle*, 59 Wash. 363, 109 Pac. 1067, annotated in 40 L.R.A.(N.S.) 647.

New trial — power to grant — grounds not specified in motion — effect of statute. That a court of general jurisdiction may set aside a judgment and grant a new trial for reasons not stated in the motion, although the statute provides that new trials may be granted on motion of the party aggrieved for specified causes materially affecting the substantial rights of such party, is held in *De Vall v. De Vall*, 60 Or. 493, 118 Pac. 843, 120 Pac. 13, annotated in 40 L.R.A.(N.S.) 291, which is also authority for the proposition that the power of the court to grant a new trial to correct errors which it discovers is not destroyed by a statute regulating the making of motions for new trial by parties aggrieved by rulings made.

Nuisance — bowling alley. A bowling alley is held in *Shreveport v. Leidenkrantz Soc.* 130 La. 802, 58 So. 578, annotated in 40 L.R.A.(N.S.) 75, to be a recognized legitimate place of amusement, the ordinary use of which cannot be interfered with by condemning it as a nuisance *per se*.

Parent and child — liability for burial expenses — child driven from home. That a

father has driven his minor son from home, and permitted him to enjoy his own earnings, is held in the North Carolina case of *Huneycutt v. Thompson*, 74 S. E. 628, not to relieve the father from liability for the son's burial expenses.

The liability of a parent for necessities furnished a minor child who is living away from the parent's home is the subject of the note appended to the foregoing decision in 40 L.R.A.(N.S.) 488.

Perjury — jurisdiction of investigation — necessity. That a committee of a common council is acting under authority to investigate and probe charges made by the acting mayor is held in the Washington case of *State v. Dallagiovanna*, 124 Pac. 209, not to show that the matter under investigation is within the jurisdiction of the council, so as to render an oath taken by a witness appearing before it one "required by law," within the meaning of a statute empowering the officer before whom it was taken to administer such oath, and, therefore, violation of the oath does not necessarily come within a statute making every person who shall swear falsely guilty of perjury.

The recent cases on the question of perjury as affected by the invalidity of the proceeding in which testimony is taken, are gathered in the note accompanying the foregoing decision in 40 L.R.A.(N.S.) 249, the earlier adjudications having been collected in a note in 54 L.R.A. 513.

Railroad — lease — discrimination in sidings — liability. That a railroad company is not liable for discrimination in siding facilities, made contrary to the provisions of a statute, by its lessee, against an adjoining mill owner, after the lease was executed, and the lessee had gone into possession of the property, is held in *Moser v. Philadelphia, H. & P. R. Co.* 233 Pa. 259, 82 Atl. 362, annotated in 40 L.R.A.(N.S.) 519.

Street railway — injury by overhang of car on curve — liability. A street car company which attempts to run a car around a curve at a time when a wagon

is between the track and the curb, in a space so narrow that it will be hit by the overhang of the car as it rounds the curve, is held liable in *Bryant v. Boston Elev. R. Co.* 212 Mass. 62, 98 N. E. 587, for the resulting injury in case the car hits the wagon and forces it against a pedestrian on the sidewalk.

This decision is accompanied in 40 L.R.A.(N.S.) 133, by the recent cases on the liability of a street railway company to one hit by the swing of a car at a curve, the earlier adjudications on the subject having been collected in a note in 16 L.R.A.(N.S.) 890.

Sunday — running pool room — liability. Apparently the first decision on the question whether keeping open a pool or billiard room on Sunday is a violation of Sunday laws, is *Ex parte Axsom*, — Tex. Crim. Rep. —, 141 S. W. 793, 40 L.R.A.(N.S.) 179, holding that running a pool room on Sunday in which a charge is made for the use of the tables is prohibited by a statute providing for the punishment of anyone who shall labor on Sunday, except certain specified works of necessity, among which running such a place is not included.

Surface water — opening drainage culvert after accumulation of water. The question of a person's liability for reopening or cleaning out a drain or natural water way after a body of surface water has accumulated, was considered apparently for the first time, in the Iowa case of *Martin v. Schwertley*, 136 N. W. 218, 40 L.R.A.(N.S.) 160, holding that the owners of land on one side of a highway from which surface water naturally drains through culverts in the highway are liable for injury to property on the opposite side of the highway for reopening the culverts, which were closed in improving the highway, after surface water has accumulated in large quantities upon their property, and casting it in a body onto the lower land.

Voter — preparation of ballot — information as to politics of candidate. Requesting assistance to determine which names on a primary election ballot are political in accord with the voter is held in

State v. Breffeihl, 130 La. 904, 58 So. 763, not to subject one to the penalty provided for any voter who shall make a false statement as to his inability to mark his ballot, where the statute provides that the voter shall be at liberty, if he is unable to prepare his own ballot, to request assistance.

The cases concerning assistance to voters are collected in the note appended to the foregoing decision in 40 L.R.A.(N.S.) 535.

Voter — residence — attendance at school. A student is held in the Michigan case of *People v. Osborne*, 135 N. W. 921, not prevented from gaining a residence for voting purposes at the place where he is attending school, by a constitutional provision that no elector shall be deemed to have gained or lost a residence while in attendance at any seminary of learning, if he goes to the college town for the purpose of establishing his residence there, although an incidental purpose is to take advantage of the educational resources of the town.

This decision is accompanied in 40 L.R.A.(N.S.) 168, by the recent cases on the subject, the earlier adjudications having been gathered in a note in 23 L.R.A. 215.

Voter — restraining election — interest of taxpayers. That a court of equity has no jurisdiction to restrain the holding of an election, since the right involved is a political one, is held in *McAlester v. Millwee*, 31 Okla. 620, 122 Pac. 173, which further decides that a taxpayer has not such an interest in a suit to enjoin the holding of an election to recall the mayor of a city of the first class in pursuance of the provisions of its charter, as will entitle him to prosecute such suit as a complainant.

Equitable interference with matters preceding election is considered in the note which accompanies the foregoing case in 40 L.R.A.(N.S.) 576.

Witness — incriminating evidence — motor car accident. The point involved in the Missouri case of *Ex parte Kneedler*, 147 S. W. 983, annotated in 40 L.R.A.(N.S.) 622, is another example of the

new questions constantly arising from the use and operation of motor vehicles, which the courts are called upon to decide. In that case it was held that an act making it a felony for one who had caused an injury by the operation of a motor vehicle, to leave the place of accident without leaving his name, address,

and license number, did not violate the constitutional provision against giving self-incriminating evidence. There seems to be but one other case in which this point has been considered, and the result there reached is in conflict with the decision in *Ex parte Kneedler*.

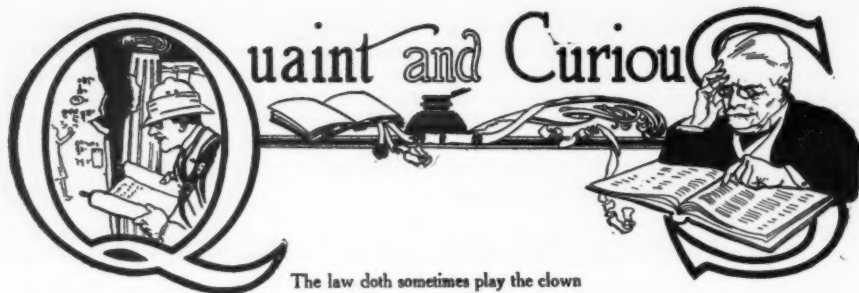
Recent English and Canadian Decisions

Burglary — entering premises with false key — effect of occupant's privity to scheme. One who induced a servant to let him have the key of his master's shop so that he could have a false key made, by means of which he thereafter obtained access to the premises, was held in *Rex v. Chandler*, 29 Times L. R. 83, to be properly convicted of breaking and entering with intent to steal, although the servant let him have the key with the knowledge of his master and in order that the defendant might be caught in the act.

Contracts — validity — restraint of trade. A contract by which plaintiffs agreed to buy from defendants a certain quantity of salt to be manufactured by them and delivered from time to time during a certain period; and defendants agreed not to manufacture salt beyond the amount to be delivered to plaintiffs and a certain quantity contracted to a third party, and such further quantity as they might require for their own use, but not for sale; by which contract the defendants had the option of repurchasing, up to a certain amount per annum (which was the amount of table salt which they were bound to deliver under their contract), of their own make of table salt at plaintiff's then current selling price for table salt; but in disposing thereof were to be subject to certain restrictions as to the class of buyers and as to price, packing, and delivery charges,—was held by the English court of appeal, in *North Western Salt Co. v. Electrolytic Alkali Co.* 107 L. T. N. S. 439, to be void as being in restraint of trade. Kennedy, L. J., dissented upon the ground that there was nothing, either

in the terms of the contract or in the evidence outside of the contract, to show that the restrictive clauses of the contract were in fact so necessarily injurious in their operation that it ought to be invalidated on the ground of public policy, either with regard to the interests of the public at large or those of the parties themselves.

Wills — condition against legatees living with or under control of their father — invalidity. A condition attached to a bequest by a testatrix to her two grandchildren, in a provision that if either of them should "live with or be or continue under the custody, guardianship, or control of their father . . . or be in any way directly under his control, all benefits, profits, and income provided to be given under this will to both or either one of them, as the case may be, shall thereby cease and determine, and it shall be at all times and under all circumstances an absolute condition of either one or both of them receiving any income, benefit, or legacy under this my will that he or she or both of them shall separately and individually continue to live free from his direct influence and control," was held in *Re Sandbrook* [1912] 2 Ch. 471, to be (1) a condition in defeasance of an interest previously given; (2) to be void as contrary to public policy, because inserted with the object of deterring the father from performing his parental duties, and also because it was an attempt to interfere with the discretion of the court as to the custody and maintenance of its wards, and (3) to be bad on the ground of uncertainty.



The law doth sometimes play the clown

A Winning Plea. John J. Crittenden, the eloquent Kentucky lawyer of a past generation, was once defending a murderer. Everyone knew the man was guilty, but the eloquence of Crittenden saved him.

"Gentlemen," said Crittenden, at the end of his great plea, "'to err is human, to forgive Divine.' When God conceived the thought of man's creation, he called to him three ministering virtues, who wait constantly upon the throne—Justice, Truth, and Mercy—and thus addressed them:

"'Shall we make this man?'"

"'O God, make him not,'" said Justice, sternly, 'for he will surely trample upon thy laws.'

"'And Truth, what sayest thou?'"

"'O God, make him not, for none but God is perfect, and he will surely sin against thee.'

"'And Mercy, what sayest thou?'"

"Then Mercy, dropping upon her knees, and looking up through her tears, exclaimed:

"'O God, make him; I will watch over him with my care through all the dark paths he may have to tread.'

"Then, brothers, God made man and said to him: 'O, man, thou art the child of Mercy; go and deal mercifully with all thy brothers.'"

A Word Picture. Mr. Choate's talent for multiplying words which might not signify a great deal, but which not only sounded well, but helped to create with a jury the impression that he sought to convey, is well known. On one occasion, in defending an insurance company against which a claim had been brought for the loss of a ship which was declared

by the defense to be utterly unseaworthy, Mr. Choate made a great impression by including in his plea these swelling words: "And so, gentlemen, overburdened with her well-nigh priceless cargo, and carrying her far more precious freight of human life, the vessel started on her voyage, painted but perfidious—a coffin, but no ship!"—Argonaut.

A Unique Document. The following is a copy of the first warrant issued in Breathitt county:

State of Jett's Creek, }
Breathitt County, Kentucky. }

I, Jackson Terry, Hi official magistrat Squire and justice of pece, do hereby issu the following rit against Henderson Harris charging him with assalt and the battery and the brech of the pece, on his brutherin law, Tom Fox by name, this warnt cuses him of kickin bitin and scrachin and throin rocks and doin everything that was mean and contrary to the law in State of Jett's Creek aforesaid.

this warent otherises the hy constable, Mils Terry by name to go forthwith and forthcomin and a rest the sed Henderson Harris and bring him to bee delt with accordin to the law of Jett's Creek and aforesed.

this warent otherises the hy constable to tak him wher he finds him on the hil sid as wel as in the level, to tak him wher he aint as wel as wher he is and bring him to me to be delt with accordin to the laws of Jett's creek and aforesed. Jinary the 2, 1838.

Jackson Terry,
hi constable, magistrat, and squir and justice of the pece of state of Jett's creek aforesed.

A Dog Puzzle. The British courts are puzzled what to do in a curious action that has arisen out of the will of a Russian princess, who died early this year, leaving £4,000 to a toy terrier named Gipsy, with the proviso that her pet should be intrusted to the care of a certain very old friend. Within six months Gipsy died, and as the legacy was practically intact when Gipsy passed away, the dog's custodian claimed that she was the legal successor to the money.

But a claim has been formulated on behalf of one of Gipsy's children, who, being a puppy of high degree, was duly registered at birth.

Now the judges are wondering what they should do with this unprecedented claim and are taking time to think the matter out.

Declined With Emphasis. Chief of Police McCord is an efficient officer, and generally responds promptly to all demands for his services, but he emphatically and positively refused when Nancy Quisenberry, colored, appeared at the police station and asked him to taste the water from her well, which she believed to have been poisoned.

"Mr. Cord, dey done told me that somebody pizened my well. I wish you would come over to my house an' taste the water," said the woman.

"Well, not on your tin type," or words to that broad general effect, replied the chief.—Winchester Sun.

Freaks of Justice Abroad. It is said that a Frenchman, replying to an inquiry made of him as to the character and qualifications of a woman applying for employment as cook, got into serious trouble when he wrote that he could not recommend the applicant "by reason of her extravagance, impertinence, and predilection to drink" while she was in his service. The person to whom the Frenchman wrote the letter showed the communication to the cook, with the result that the latter immediately brought suit for damages against the writer.

This case showed a peculiar feature of the French law on this subject. The matter was decided against the writer, who was fined and admonished that he

had no right to circulate injurious statements concerning another person, even though the statements might be true. Since that time, it is said, French housekeepers, to evade the responsibility thus placed upon them by law, have issued certificates of character in form something like the following:

"This certifies that Mme. Marie, late nurse to my daughter, aged one year, did not leave her on a bench in the Jardin des Plantes and go away and forget her on October 12 last."

It is obvious that a certificate of this sort serves its purpose without in any way laying the writer open to a suit for damages.

Another curious illustration of the principle of responsibility abroad is afforded by a civil damage suit growing out of the breaking of a plate-glass window in a German town. A witness had testified as follows:

"As I was passing down the street in front of the window, I saw a big stone come whirling through the air. I did not know whence it came. I saw it coming through the air, and I had just time enough to dodge to save myself from being hit by it."

The witness was sharply questioned upon the point whether the stone that broke the window would have struck him had he not dodged it. He was then dismissed. Eventually the decision of the magistrate was this:

"Inasmuch as if the witness had not unfortunately ducked his head the glass would not have been struck by the stone, he is hereby adjudged responsible for the breaking of the window, and is ordered to pay to the owner the value of the same."

The Paris concierge has always been a privileged person, but he has acquired new importance within recent years by reason of a court decision handed down there. A concierge had permitted himself the liberty of opening the letters of a young lady, one of the tenants of the house.

Discovering the fact, the young woman brought suit against the concierge. The case was tried, and was decided against the young woman, it being held that the responsibility of the state ended

with the delivery of the mail to some person who was authorized to receive it, and that the concierge was such a person. But the court censured the concierge for being "guilty of an indelicacy."

There was no redress for the owner of the letters beyond this, and, to complete the whole, the concierge next brought suit in his turn, against the young woman. This, however, was too much for any court. The case was dismissed without a hearing.

The Great Lawyer. This is the age of investigation and of speculation. All sorts of inquiries are propounded, such as "What is a Democrat?" And now we have this question, "What is a lawyer?" One respectable and eminent authority answers that he must have a collegiate training and get his law learning in a law school, else he can never expect to be other than a "case lawyer," and not much of that.

One opinion is that lawyers are born, not made. Unless one have the "legal mind," all the colleges and all the study in the world will not make a lawyer of him, and if he be gifted with the legal mind he will get to be a great lawyer, although he never saw a college and never read half the text-books. Abraham Lincoln was one of them.

Robert Burns never went to college, but he ranks among the greatest poets of all the world. Ben Hardin, of Kentucky, never attended a law school, but he was the equal of any lawyer our country has produced. To be a great lawyer, one must understand the philosophy, the science of it. All the study in the world, in college or out of college, and all the experience the court room can supply, will not reveal the philosophies of the great principles of our jurisprudence; and yet your greatest lawyer, however much he understands the reason of "the rule," must make himself acquainted with the history of the rule, when it was established, and the conditions that called it into being.

John Marshall was not a learned lawyer. He was not versed in the precedents as Story was, or as any other one of his associates on the bench was; but he knew the principle and applied it to

every case, and he cared not whether there was precedent or not. If there was, all well and good; if there was not, he established the precedent. Your "case lawyer" can give no opinion offhand. He must search the precedents; but your great lawyer applies the philosophy of the law to given facts, and he flings precedents to the winds if they be contrary to his conception. Hence from the bench we have "leading cases."

The late William Lindsay, when on the supreme bench of Kentucky, rendered an opinion about rents for the occupancy of real estate, or something of that kind—for this paper is a layman and cannot hope to be versed in the nomenclature of the profession. Judge Lindsay adjudicated in reversal of the precedents of America since its first settlement by the Anglo-Saxon and in reversal of the precedents of England for centuries, and to-day his decision is a precedent and is cited as conclusive authority in the courts of Great Britain.

Lindsay never attended a law school. He did not have to. He was a natural-born lawyer.—Washington Post.

Result of Jury Service. "Could you tell us how far it is to the postoffice?" we asked of the man standing on the railway platform.

"I have no idea," he replied.

"Well, in which direction is it?"

"I have not formed an opinion."

"Can we walk there or should we take a car?"

"I could not say."

"There is a postoffice here, is there not?"

"I would not decide that with my present information."

"But every town has a postoffice, hasn't it?"

"I have not talked with anybody on the subject."

"Is there anyone around here who can tell us?"

"I have not read any of the newspapers."

"But, man, you surely know whether or not there is a postoffice?"

"I could not give a decisive answer to that."

"But don't you live here?"

"I have never given the matter any thought."

"Where do you live?"

"I have no mental bias in the matter."

"Great guns, man! You know you're alive, don't you?"

"I should be guided entirely by the evidence."

Here a listener plucked our sleeve, smilingly. He took us to one side and says:

"You won't get anything out of him if you quiz him all day. That's Pete Hobawot, who's been on so many jury panels it has affected him."—Chicago Post.

Learning the Law. At the annual banquet of the Notre Dame Society of Chicago Dean William Hoynes, who was recently made a Knight of St. Gregory by Pope Pius, told of an experience he had some years ago at Notre Dame while teaching a pupil who is now a leading member of the Chicago bar.

"This young man," said Dean Hoynes, "had a habit of going to sleep in class, and this was very aggravating to me. No matter how important the lecture was he was sure to be asleep at the most important part."

"I finally decided one day to deal with him severely the next time he went to sleep during class. The lecture was dry, I will admit that, and the day was warm and sure enough my sleepy friend was soon sound asleep. Walking up beside him I shouted his name at the top of my voice. He started and looked up at me bewildered."

"Young man, how do you expect to learn law?" I demanded, "By intuition?"

"No, sir," came the answer quick as a flash, "by paying tuition."

"And the laugh was on me. I had to let him off and didn't punish him, and to-day he is one of the best-known lawyers in Chicago."

Depew's Spartan Father. I remember as if it were yesterday when my father, who was well-to-do and carrying on a prosperous business, said, "Now you have your profession as a lawyer, you have a small but good working library, and your shingle is nailed on the door;

you will never get another dollar from me except through my last will and testament." I could have got along easier after being thus thrown out of the second-story window if I had not been coddled before, but to be deprived of all income was a trying situation. Several times, when in great stress and debt, I went to my father and stated the conditions, and, while the tears would roll down his cheeks, he maintained a Spartan consistency in action. I thought very hard of him during those years, but have blessed him ever since, because this drastic method was essential to independence, though it might have been tempered with a little mercy.—Arthur Wallace Dunn, in *Leslies*.

Mountain Justice. Magistrate's court in a mountain county of eastern Kentucky, held at a county schoolhouse. Prisoner, Jno. Foreman, charged with hitting T. J. Purdee with a whip stock. After all evidence was in, the court wrote the instructions for the jury of six, as follows:

Commonwealth	}	Salt & batter.
vs.		
Jon. furmen.		

1. ef tha Jury bleeve frum tha evdence that Jon furmen is gilty of strikin t. J. purdee with tha butt eend of a whoop stock er eny uther blunt insterment, malishus & malonus er with malis forethink, you shoood find him exceedin won hundred dollars at your excursion.

2. ef you bleeve that he used eny salt and batter on him you shoood also find him exceedin won hundred dollars and cost at your excursion.

"Gentlemen, now the jury will tire to the bushes and fine a verdick."

The spokesman of the jury, on retiring back of the schoolhouse, said: "Gentlemen, we must fine the man \$100 under these instructions," when one Willis of the jury said: "Yes, that's what them instructions say, but they also say to give him excursion rates, so let's give him \$17 and court costs," which was done.



"Men disparage not antiquity who prudently exalt new inquiries."—Sir Thomas Browne.

"Criminal Law." By Francis Wharton, LL.D. Eleventh edition, with additions, by James M. Kerr. (The Lawyers Co-operative Publishing Co., Rochester, N. Y.) Three volumes \$22.50 delivered.

Dr. Wharton was a writer who maintained and preserved to our own day the earlier tradition of our juridical science which made a text-book in the law an addition to literature. The value of his works to the bar has been sufficiently shown by their sale; but this compliment is but too often paid to treatises to which it is possible to attach importance only until some new compilation supersedes them. The volumes with which Dr. Wharton enriched the literature in which American letters has some of its noblest monuments, owed to style and philosophic arrangement no small part of the value they possessed, and it is these qualities which render permanent the work of a jurist. It is a distinctive feature of Dr. Wharton's books that, in addition to their convenience and authority as works of reference, they possess a peculiar literary charm. This is due in large measure to the freshness of his thought and the force and vivacity of his forms of expression.

While Dr. Wharton dealt much in precedents, he was never the slave of authority. *Stare decisis* was not a rule whose limitative force he felt himself bound to acknowledge. "So it hath been decided" was not enough to silence his objections. That he diligently searched the books for opinions and precedents, in order to ascertain what had been determined, the wealth of his citations amply shows. He always knew the latest cases. But he never held himself to be precluded from criticizing and disapproving what he cited, no matter how high the tribunal from which the expression came. Being the man that he was he could not do otherwise. He had a legal mind in the best sense of that term. He appreciated the nicest distinctions and discriminated closely and clearly. His mind was philosophical; he treated his subjects in that manner; he examined questions fully upon authority, and often went beyond authority into exhaustive discussions upon pure principle.

His first reputation as a legal author was made by his writings on criminal law. This was due to the fact that soon after his admission to the bar he was appointed to an assistant attorney-generalship in his native state and city. This turned his attention towards criminal law. There was no good work on the subject. The young prosecuting attorney as an induction from his court labors, published his treatise on criminal law, which, issuing in ever enlarged editions, for over sixty years has held its ground. The work gave him both reputation and financial reward, and induced him to regard law authorship as thereafter his special branch of the profession.

The single volume which he first brought out subsequently grew by the work of his hands to two. Now the developments in this branch of the law have rendered imperative a new edition comprising three large volumes. The work has been ably prepared by Mr. James M. Kerr, well known to the legal profession as an accurate and brilliant writer. Every part of the work has been brought down to date, hundreds of new sections and even whole chapters added. A noteworthy feature of the book is the codification of the Criminal Statutes of the United States, which have been added as an Appendix.

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"The French at Panama."—Scribner's Magazine, January, 1913, p. 25.

Parks.

"National Parks—The Need of the Future."—The Outlook, December 14, 1912, p. 811.

Patents.

"Proposed Investigation of the Patent Office—Suggestions of United States Trade-mark Association."—45 Chicago Legal News, 170.

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"Why Women Should Vote."—The Fra, January 1913, p. 125.

Waterways.

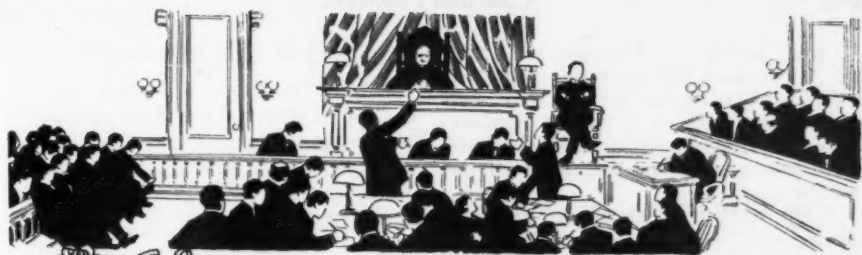
"American Waterways and the 'Pork-Barrel.'"—Century Magazine, January 1913, p. 386.

Wills.

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Judges and Lawyers

A Record of Bench and Bar

Mississippi's New Chief Justice

By S. R. DAVIS

BY the recent resignation of Honorable Robert B. Mayes, Honorable Sydney Smith became chief justice of the supreme court of Mississippi.

Mr. Chief Justice Smith was born in Lexington, Mississippi, April 9th, 1869, and was educated there in the public schools, receiving his professional training at the University of Mississippi, graduating in the law class of 1903. He was admitted to the bar immediately after his graduation, and shortly thereafter formed a partnership with Honorable J. W. George at Yazoo City, the firm name being George & Smith. This partnership was soon terminated, and Judge Smith returned to Lexington, and formed a partnership with Honorable W. P. Tackett, the firm name being Tackett & Smith, which partnership continued until he was ap-

pointed judge of the fourth judicial district, in September, 1906.

Judge Smith was a member of the legislature of Mississippi from 1900 to 1906, and served in that body with distinguished ability. He was appointed Associate Justice of the supreme court by Governor Noel May 10th, 1909.

In every public position which he has

held, Judge Smith has discharged his duties with fidelity and ability. Since he became a member of the supreme court he has delivered some notable opinions, especially on the prohibition question. Judge Smith is an advocate of temperance, and he believes that the prohibitory law of the state should be enforced, and he is not disposed to tolerate any subterfuges which will interfere with the enforcement of this or any other law on the statute books.



HON. SYDNEY SMITH

Chief Justice Smith's opinions from the bench have always been clear and lucid in their reasoning, and they will rank among some of the ablest opinions delivered from a bench which has always been marked by the ability of its members.

Judge Smith is a man of rare personal charm, and is deservedly popular with the bench and bar of the state. For many years he has been the secretary treasurer of the Mississippi Bar Association, and through his influence the association has gained in membership and efficiency, and its annual meetings are looked forward to with pleasure, not only by the members of the association, but by the people of the different cities where its annual sessions are held. These meetings have a fine social side, in which the leading citizens participate.

Among other accomplishments Judge Smith is a devout student of Bible literature, and for years he has taught a large class for men in one of the leading churches of the capital.

In the prime of a vigorous manhood, with his past experience at the bar and on the bench, and with an earnest desire to do his full duty, Chief Justice Smith will be able to render valuable service to the people of his state.

Decease of Oldest Philidelphia Lawyer.

Mr. William S. Price, the oldest lawyer in Philadelphia, and a friend of Edgar Allan Poe when the poet was a resident of that city, died recently. He was ninety-five years old. Mr. Price was a member of the bar seventy-three years, and during that period was engaged in many important cases. He was for many years chancellor of the Protestant Episcopal Diocese of Pennsylvania.

Tragic Death of Congressman.

Representative William W. Wedemeyer of Ann Arbor, Michigan, who suddenly went insane at Colon at the time of President Taft's visit to the Isthmus of Panama, jumped overboard on January 2, while on a ship bringing him home.

Mr. Wedemeyer was a member of the law firm of Cavanaugh, Wedemeyer, & Burke. He was forty years old.

Death of Milwaukee Lawyer.

Edward P. Vilas, a leading lawyer, and one of Milwaukee's most prominent men, and brother of the late United States Senator William F. Vilas, died on December 26th from injuries sustained Christmas night, when he fell downstairs in his home.

Mr. Vilas was sixty years old, and was born in Madison. He was the son of Judge Levi B. Vilas. After graduating from the state university in 1872, he was private secretary for the division superintendent of the Northwestern road for a year. Then he read law for a few years in the office of Vilas & Bryant, and in 1875 was graduated from the law department of the university, after which he was admitted to partnership in his brother's office. After Colonel William F. Vilas, who was a member of the firm, was elected to the United States Senate, E. P. Vilas continued the law office alone. He went to Milwaukee in 1888, and became a member of the firm of Jenkins, Winkler, Smith & Vilas. After Mr. Jenkins retired, the firm was reorganized as Winkler, Flanders, Smith, Bottum, & Vilas. Mr. Vilas retired from the firm several years ago.

Mr. Vilas was a life-long Democrat but never held public office except that of court commissioner while he was a resident of Madison.

Boston Lawyer Dead.

Lafayette G. Blair, a well-known Boston lawyer with offices in the Tremont building, died on December 7, at his home in Watertown. He was admitted to the Middlesex bar in 1881. Before moving to Watertown, twenty-three years ago, he lived in Cambridge. He has been prominent in town affairs of Watertown.

He was a thirty-second degree Mason and only a few weeks ago retired from the office of grand commander of the grand commandery of Massachusetts and Rhode Island, Knights Templars.

Hon. Byron K. Elliott

Lawyer, Judge, Preceptor, and Author

HONORABLE Byron K. Elliott has long been a prominent figure at the Indiana bar, and is well known as a legal author by his treatises on "The Work of the Advocate," "Appellate Procedure," "The Law of Roads and Streets," "The Law of Railroads," and "Law of Evidence."

In his book, "The Work of the Advocate," he gives some excellent advice to the young lawyer starting in practice. In his opening statement he says: "Preparation is the foundation of success in advocacy."

Judge Elliott, during the years he was actively engaged in professional pursuits, says one who knows him intimately, "always endeavored to practise what he preached. He talked with the witnesses himself

before trial, and prepared written instructions for the jury as far as possible. He was generally prepared, too, for all emergencies, and he tried cases so as not only to get a verdict if possible, but also to hold it, or, if against him, to obtain a reversal on appeal. His line of examination in chief was decided upon before the examination began, and his cross-examination was not aimless. He was prepared both as to the law and as to the facts, and the conduct of the trial was laid out before the trial began."

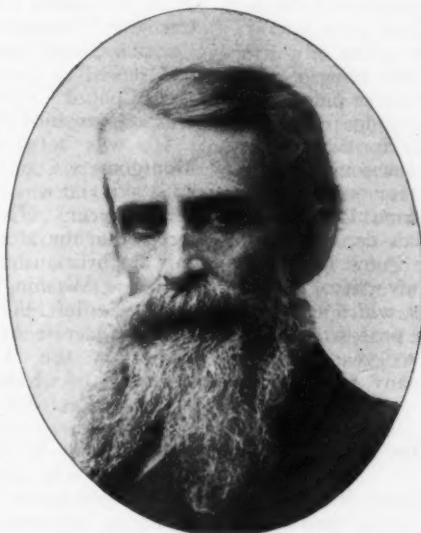
"Another noticeable characteristic was the rapidity with which he worked. He

knew where and how to find the authorities, and he was a very rapid, and at the same time legible, writer. While he was upon the bench, before typewriters were in general use, and when the judges had no stenographers, but had to do their own writing, he wrote the opinion, required by an emergency, in the very im-

portant case of *Butler v. State*, 97 Ind. 378, within twenty-four hours, sitting up nearly all night to do it. He could not get used to dictation, and always insisted that dictated work was more verbose, and not so certain and accurate as when one did one's own writing; but he thought and wrote so rapidly and was so familiar with general principles and with the books and terminology of the law, that he could do even more work in his own way than the aver-

age man can do with the aid of a stenographer and typewriter."

In an address to the graduating class of the Central Law School, in 1880, Mr. Elliott said: "Your diplomas will no more carry you to eminence in your profession than the noise of a locomotive whistle will drag a train to the summit of a steep grade; but as the noise of the whistle indicates the power behind it, so do your diplomas indicate that behind them is a power that can pull you to the very top. Whether you get to the top depends upon whether you rightly use the power which has enabled you to win



HON. BYRON K. ELLIOTT

your degree. Work, constant and determined work, is demanded of the lawyer. The penalty for a failure to meet this demand is the loss of the coveted success. This is an organic law which courts cannot overrule nor legislatures repeal. The lawyer cannot too soon lay it to heart that, better than the genius of poetry, fable, or song, is the genius of hard work."

Judge Elliott was born at Hamilton, Ohio, September 4, 1835. He was admitted to the bar at the age of twenty-three. His practice was interrupted by military service performed during the Civil War as captain in the 132d Indiana Volunteers, and as a member of the staff of Major General Milroy.

He was for several terms city attorney of Indianapolis, and later occupied judicial positions, serving as judge of the criminal circuit court, judge of the superior court, and finally, for twelve years, as judge of the supreme court.

Judge Elliott was for several years president of the Indiana Law School, and a lecturer in the law departments of Butler University, De Pauw University, and Northwestern University. He has liberally paid the debt which each man is said to owe to his profession. Few men have performed so great and valuable services in so many fields of endeavor.

Virginia Jurist Dies Suddenly.

Judge Archer A. Phlegar, distinguished Virginia lawyer and jurist, died at his home in Bristol, Virginia, December 22, 1912. It was Judge Phlegar's oft-expressed wish that he might die "in harness" and this wish was virtually fulfilled, for he had just concluded the argument in an important civil suit in the corporation court of Bristol, when he became ill and had to hasten to his home.

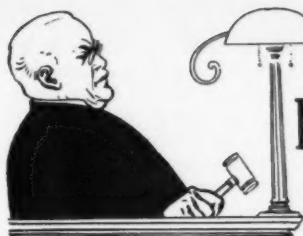
Judge Phlegar's rather sudden death removes one of the most distinguished lawyers and jurists, not alone of his own state, but of the entire South. He was an authority upon all important questions of law, and during many years of active work made for himself a reputation which only high merit could pos-

sibly have attained. In recent years he had been at the head of the law firm of Phlegar, Powell, Price & Shelton, of Bristol, which firm has had an important clientele extending over portions of Virginia, Tennessee, and West Virginia, and embracing clients among important financial and corporate interests in New York city and other financial and commercial centres.

During the last fifteen years Judge Phlegar had not only represented various important corporations in the capacity of legal adviser, but, aside from his service in this capacity to the Norfolk & Western Railway Company, the Virginia & Southwestern Railway Company, the Carolina, Clinchfield, & Ohio Railway Company, and kindred corporations, he had served as receiver for the Virginia Iron, Coal, & Coke Company, which has a capital stock of \$10,000,000.

He was born at Christiansburg, in Montgomery County, Virginia, February 22, 1846, and was therefore in his sixty-seventh year. His early education was received at the Montgomery Male Academy at Christiansburg. He later took the course at Washington and Lee University. He left the university to enter the Confederate Army. He served as a soldier in the Fifty-fourth Virginia Regiment, of which his uncle, Robert C. Trigg, was colonel. At the close of the Civil War, he studied law under the late Judge Waller R. Staples, of Christiansburg. He was admitted to the bar at Christiansburg in 1869. He rapidly attained to eminence in his profession. One of the first positions held by him after being admitted to the bar was that of commonwealth's attorney for Montgomery county. He served as a member of the Virginia state senate in 1881, and was again elected to that body in 1903, and between that year and 1905 had a conspicuous part in shaping the legislation necessary to make the Code of Virginia conform to the new state Constitution.

Judge Phlegar's death is not only a distinct loss to the profession which he honored through so many years of successful practice, but to the state and community.



The Humorous Side



Laugh all you can. It is good for you.—John A. Cone.

The Careful Valentine. There is a young man in this town who likes the ladies, but who doesn't wish to be captured. Consequently his attentions are rather timorous. He went to a poetical friend recently, and spoke thusly:

"Say, old man, you are something of a poet."

"What of it?"

"I want you to help me get up a valentine for a young lady."

"What do you want to say?"

"Well, I want to say something sort of tender, don't you know, but at the same time I don't want to commit myself, understand."

"But you don't want a poet to draw up your valentine. What you want is a lawyer."—Washington Herald.

A Poetical Quotation. Attorney General Davidson, of Texas, tells the following story of the maiden effort of a young Galveston lawyer who had planned to quote a fine passage of poetry in the peroration of his speech to the jury. "Gentlemen of the jury," he said, "I can conclude my plea as to the merits of this case in no better way than to quote the beautiful lines of that famous poet, Mr. —Mr.—well, gentlemen, just for the moment I have forgotten the poet's name, but no matter; anyhow, he says—um—why—(*sotto voce*) I'll be d—d if I haven't forgotten what he said!"

The Legal Viewpoint. First Lawyer—I was looking over my boy's geometry lesson last night. I was quite interested in that proposition, that the three angles of a triangle are equal to two right angles.

Second Lawyer—That isn't very complicated.

First Lawyer—No, but I was trying to think what a man could do if he had the other side of the case.—Puck.

Swallowed the Evidence. Peter Burrows, an eminent Irish barrister, was on one occasion, while defending a prisoner, oppressed with a cough, which he sought to soften by the occasional use of lozenges. The client whom he was defending was indicted for murder, and it was deemed important in his defense to produce the bullet with which it was alleged the deed was done. This he was about to do, and held the bullet in one hand and a lozenge in the other, when, in the ardor of advocacy, he forgot which was which, and, instead of the lozenge, swallowed the bullet.

A Good Sport. Judge Gillette was one of the most dignified of old-fashioned jurists. One day he was holding court at a county seat in a rather out-of-the-main-road county, when a violent hubub in the hallway interrupted proceedings in the court room. After quieting the disturbance the sheriff returned to report to the judge. "It was two men fighting," explained the official. "Danny Flannigan and Jake Jenkins, tough characters about town. I have put them under arrest." And he waited, expecting the magistrate would order both offenders to be brought into his presence and committed for contempt.

What was the sheriff's astonishment, therefore, when the judge beckoned him to the desk, and bending down, said in a confidential whisper:

"Which licked?"—Illustrated Sunday Magazine.

It Struck Him. "As a matter of fact," said the defendant's attorney, trying to be facetious, "you were scared half to death, and don't know whether it was an automobile or something resembling an automobile that hit you."

"It resembled one, all right," the complaining witness made answer: "I was forcibly struck by the resemblance."—Chicago Tribune.

Arizona's Climate. At a recent dinner Judge Fisher, of Arizona, was introduced by the toastmaster in a long speech dealing humorously with the change in vocation made by the judge after arriving in the territory, soon to become a state. Judge Fisher noted this effort in the first paragraph of his address, and admitted that when he came to Arizona he was a preacher. "But when I saw what glorious winter weather the territory had, warm sunshine, flowers blooming, birds singing, I understood why the people were indifferent about going to heaven. And in summer I realized that hell had no terrors for them."

Into His Own Trap. In a suit lately tried the plaintiff testified that his financial position had always been a good one. The opposing counsel took him in hand for cross-examination and undertook to break down his testimony upon this point.

"Have you ever been bankrupt?" asked the counsel.

"I have not."

"Now, be careful," admonished the lawyer with raised finger. "Did you ever stop payment?"

"Yes."

"Ah! I thought we should get at the truth," observed the counsel, with an unpleasant smile. "When did this suspension of payment occur?"

"When I paid all I owed."—Philadelphia Telegraph.

Mode of Conveyance. "May it please your Honor," said a lawyer, addressing one of the judges, "I brought the prisoner from jail on a habeas corpus." "Well" said a man in an undertone, who was standing in the rear of the court. "these lawyers will say anything. I saw the man get out of a taxi at the court door."—Harper's Bazar.

Searching the Records. A noted judge had a case at court wherein a county officer had appropriated some of the county's money, and in trying to locate certain items, the reply of the witness was: "That is as I remember it."

The judge then asked him. "Where are the records of these items?"

The reply of the witness was: "I just kept them in my head."

"That is all very well," said the judge, "but when you die, we don't want to have to travel too far to search the records."—Los Angeles Times.

Accelerated Brain Activity. In the early days of Wisconsin two of the most prominent lawyers of the state were George B. Smith and I. S. Sloan, the latter of whom had a habit of injecting into his remarks to the court the expression. "Your Honor, I have an idea." A certain case had been dragging along through a hot summer day when Sloan sprang to his feet with his old remark, "Your Honor, I have an idea."

Smith immediately bounded up; assumed an impressive attitude, and in great solemnity said:

"May it please the court. I move that a writ of habeas corpus be issued by this court immediately to take the learned gentleman's idea out of solitary confinement."—Popular Magazine.

Absolutely Correct. Senator Bailey, of Texas, was once chairman of a committee to examine candidates for admission to the bar in Dallas county, and, after the examination, he reported to the presiding judge that one of the aspirants had not qualified, having answered correctly only one of the questions put to him.

"Only one?" asked the judge, "What was that one?"

"I asked him what a freehold estate is," replied Bailey.

"An important question," remarked the judge; "and what was his reply?"

"He replied without the least hesitation," answered Bailey. "That fact is, of course, in his favor."

"Well, what did he say?" insisted the judge.

"He said," replied Bailey, "that he didn't know."—Popular Magazine.

